TRANSCRIPT OF RECORD.

Supreme Court of the United States.

166-721

OCTOBER TERM A. D. 1896.

No. 167. 22

THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD,

Appellants,

vs.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY, AND THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD COMPANY,

Appellees.

JOHN C. COOMBS,
~~GUSTAVUS H. WALD~~,
Chas. K. Hamer
Counsel for Appellants.

ROBERT G. INGERSOLL,
CLARENCE BROWN,
Counsel for Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Filed Sept 14. 1894

15682

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Counsel for Appellants.

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CHANCERY — UNITED STATES OF AMERICA.

To the Toledo, Delphos & Burlington Railroad Company, and The Toledo, Cincinnati & St. Louis Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago thirty days after the date hereof, pursuant to an appeal which has been allowed by the Circuit Court of the United States for the District of Indiana, from its final decree in a suit wherein The Bondholders and Purchasers of the Iron Railroad is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness William A. Woods, Judge of the Circuit Court of the United States for the District of Indiana, this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-three.

W. A. WOODS,
Judge.

[SEAL]

Service of within citation acknowledged this 8th day of March, 1893.

ROBERT G. INGERSOLL *and*
CLARENCE BROWN,
Solicitors for Appellees, the Bondholders and Purchasers of the Toledo, Delphos & Burlington Railroad, and the Toledo, Cincinnati & St. Louis Railroad.

1 Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House in the City of Indianapolis in said District, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and ninety-two, before the Honorable Walter Q. Gresham, Judge of the Circuit Court of the United States, for the District of Indiana.

Grenville D. Braman
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,672. Chancery.*

The Central Trust Company of New York
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706. Chancery.* *No. 7,706. Chancery.*

Edward F. Leonard, *et al.*
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814. Chancery.*

Be it remembered that heretofore, to-wit: At the November term of said court, on the 29th day of February, 1892, before the Honorable William A. Woods, one of the judges of said court, the following proceedings in the above entitled causes were had, to-wit:

2 Comes now the Iron Railroad Company by J. C. Coombs, Esq., its solicitor, and files its petition to amend its petition for rehearing herein, and also files its amended petition for rehearing herein; and also files its motion to vacate the decree herein.

And said amended petition for rehearing is in the words following, to-wit:

Amended petition on the part of the first mortgage bondholders and purchasers of the Iron Railroad for a hearing on the question of the allowance of the claim of the Iron Railroad for the net earnings while in the hands of the receiver, and the Narrow-gauge, mortgage, divisions of the Toledo, Cincinnati and St. Louis Railroad.

To the Honorable the Judges of the Circuit Court of the United States, sitting in equity within and for the District of Indiana, Western Division.

Respectfully represents the first mortgage bondholders and the purchasers of the Iron Railroad in the foreclosure sale of the same

in the above entitled case, that during the time the said Iron Railroad was in the hands of the receiver in said case, and for a period of three months prior thereto, while Edward E. Dwight, a receiver appointed in a certain bills in equity filed by one Grenville D. Braman, a judgment creditor of said Toledo, Cincinnati and St. Louis Railroad, in the Circuit Court of the United States, for the Southern District of Illinois, the District of Indiana and the Northern District of Ohio, Western Division, claimed possession of said Iron Railroad under said creditors' bill as a part of said Toledo, Cincinnati and St. Louis Railroad, the net earnings of said Iron Railroad amounted to $41,748.39; which sum was received and expended in part by Receiver Dwight, and as to the remained by said Receiver Craig in the operation and for the benefit of certain other mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad; and that, notwithstanding the facts and circumstances hereinafter mentioned, at a hearing had in the City of Cleveland in the Circuit Court of the United States, for the Northern District of Ohio, Eastern Division, beginning on the 6th day of April, A.D. 1887, a certain judgment and decree was entered in said case, and in certain other cases hereinafter mentioned, rejecting the claim of your petitioner, in behalf of the Iron Railroad, to be re-imbursed for and on account of its net earnings which had been received and applied by said receivers, as aforesaid; the reversal of which judgment
3 and decree and the allowance of which claim, are the object of the rehearing prayed for in this petition upon the following facts and showings, to-wit:

First: That said hearing in the City of Cleveland was held at a term of said Circuit Court of the United States for the Northern District of Ohio, Eastern Division, beginning upon the first Tuesday of April A.D. 1887, at which time also a new term began of said Circuit Court of the United States for the Southern District of Ohio, Western Division, the prior term of said last mentioned court, which began on the first Tuesday of Feb. in said year, having already ended; that at said February term of said Circuit Court of the United States for the Southern District of Ohio, Western Division, a hearing had been had upon the exceptions theretofore filed to the final report of Jacob D. Cox, a Master in said case, to whom the matter of said Iron Railroad's claim among other things had been referred by said court and whose report found in favor of said claim; and said exceptions had been overruled and an entry made in said court in said February term thereof establishing said claim; that said finding was afterwards adopted by Messrs. Fishback and Ricks, appointed Masters in said cases for the foreclosure of the constituent mortgage divisions of the Toledo, Cincinnati and St Louis Railroad and reported to said Circuit Courts in which cases were pending, all of which is more specifically hereinafter set forth; that no exceptions had been taken or filed at the time of said hearing in said

City of Cleveland to such adoption or finding in favor of said claim, nor was the time for filing such exceptions, if such adoption or finding by said Masters Fishback and Ricks was then subject to exceptions, expired; nor was there on any record or otherwise at the time of said hearing in said City of Cleveland any notice that any question as to the allowance of said claim would be raised or was then open; and said claim was rejected only on exceptions which the decree disallowing same allows at that time to be filed.

Second: That at said hearing in said City of Cleveland, the court consisted of his Honor Judge Jackson, Judge of the Circuit Court of the United States for the Sixth Circuit, his Honor Judge Gresham, Judge of the Circuit Court of the United States for the Seventh Circuit, his Honor Judge Walker, Judge of the District Court of the United States for the Northern District of Ohio, sitting as a Judge in said court; and that neither his Honor Judge Gresham nor his Honor Judge Walker were reasonably presumed to be familiar with the records of the Circuit Court of the United States for the Southern District of Ohio, Western Division, upon which rec-
4 ords principally the claim of said Iron Railroad rests; that neither this case nor, as your petitioners are informed and believe, any other cases in which said claim of said Iron Railroad is involved, is pending in said Circuit Court of the United States for the Northern District of Ohio, Eastern Division; nor is the record of any of said cases, as your petitioners are informed, to be found in said court or otherwise in said City of Cleveland, nor was any part of the same produced at said hearing, except such as counsel happened to be able to show from certified copies thereof in their possession without previous notice as to what might be pertinent or required in the premises.

Third: That the inception of the proceedings involved by said judgment and decree took place before Judge Drummond, formerly Judge of the Circuit Court of the United States for said Seventh Circuit, and some of the facts pertinent to the allowance or rejection of said claim were a part of the acts and doings in Chambers of said Judge Drummond, who has since retired and has been succeeded by his Honor Judge Gresham, who is not fairly to be presumed to be familiar with all the facts which transpired under the jurisdiction and administration of his said predecessor, as aforesaid.

Fourth: That by far the greater part of the record of the Circuit Court of the United States for the Southern District of Ohio, Western Division, where this case is pending, was made up under the direction and in accordance with the orders, judgments and decrees of the Honorable John Baxter, late judge of said Circuit Court, since deceased, with whose acts and doings in the premises, his Honor Judge Jackson, who succeeded Judge Baxter, is not fairly to be presumed to be familiar in the absence of said record.

Fifth: That because of the extent of said Toledo, Cincinnati &

St. Louis Railroad, and the different jurisdictions necessarily invoked in the administration of its affairs under the direction of the court, and the complication arising from the different views which were entertained in respect to the effect of the inception of the proceedings by and in behalf of a judgment creditor, and in separate foreclosure of the mortgages upon the several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad at different times and under separate bills, and the difference in the proceedings which were had in respect of so much of said road as ran from Toledo to East St. Louis, from such proceedings as were had in respect of so much of the said road as lay south of Delphos, Ohio, it is fairly to be apprehended that his Honor Judge Gresham, of the Seventh Circuit, and his Honor Judge Walker, of the Northern District of Ohio, might, in consultation, entertain and promulgate opinions consistent with the records of their own courts only without taking into sufficient consideration the records of the Circuit Court of the United States for the Southern District of Ohio, Western Division, unless the same should be brought to their attention; and that it is fairly to be apprehended that his Honor Judge Jackson, because of his appointment after the greater part of said record had been made up, and in absence of said record, and in the absence of proper representation and aid from counsel (who were substantially unprovided with copies of said record, because not notified that any necessity therefor would arise), was not at said hearing sufficiently familiar with the facts of said record, nor able to see to it that the same exerted the influence to which it was entitled in determining any judgment or decree affecting or based upon proceedings in respect to said Toledo, Cincinnati and St. Louis Railroad and several mortgage divisions thereof in all of said courts; and that said claim of said Iron Railroad was more or less involved in, based upon and affected by all of the records of all of said proceedings, and especially the records in this case in the Circuit Court of the United States for the Southern District of Ohio, Western Division.

And your petitioners show in respect of the records and proceedings hereinbefore referred to as follows:

First: Your petitioners file here in court, and make a part hereof an exhibit by copy of certain records, certificates, orders, entries, references, judgments, decrees, reports, exceptions, tables, evidence, and other papers and memoranda heretofore or now in evidence herein, as the same appear or have occurred in the cases hereinafter in this article mentioned, and to which, in support or exemplification of the allegations herein contained, reference will be made briefly under the alphabetical marks upon each in said exhibit.

An index of the cases is as follows:

Braman v. T., C. & St. L. R. R. Co., No. ——, So. Dist. of Ill., Whole Line; entered July 31 to August 2, 1883.

Braman v. T., C. & St. L. R. R. Co., No. 7,672, Dist. of Indiana, Whole Line; entered July 31 to August 2, 1883.

6 Braman v. T., C. & St. L. R. R. Co., No. 366, No. Dist. Ohio, Western Division, Whole Line; entered July 31 to August, 1883.

Central Trust Co. & Thos. A. Hendricks v. T. C. & St. L. R. R. Co., No. ——, So. Dist. of Illinois, Foreclosure St. Louis Division; entered October 22, 1883.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 380, No. Dist. Ohio, Western Division, Foreclosure Toledo Terminal; entered October 18, 1883, afterwards absorbed in No. 382.

Stevenson vs. T., C. & St. L. R. R. Co., No. 381, No. Dist. Ohio, Western Division, Foreclosure Toledo Division; entered October 20, 1883, consolidated with 382.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 382, No. Dist. Ohio, Western Division, Foreclosure Toledo Division; entered October 22, 1883.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 7,706, Dist. of Indiana, Foreclosure Toledo Division; entered October 20, 1883.

Edward F. Leonard vs. Central Trust Co., Hendricks and T., C. & St. L. R. R. Co., No. 7,814, Dist. of Indiana, Foreclosure St. Louis Division; entered June 16, 1884, consolidated with 7,815.

Central Trust Co. vs. Hendricks & T., C. & St. L. R. R. Co., No. 7,815, Dist. of Indiana, Foreclosure St. Louis Division; entered June 17, 1884.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 3,554, So. Dist. Ohio, Western Division, Foreclosure Cincinnati Northern; entered October 20, 1883.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 3,576, So. Dist. Ohio, Western Division, Foreclosure Cincinnati Division; entered October 20, 1883.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 3,577, So. Dist. Ohio, Western Division, Foreclosure Dayton Division; entered October 20, 1883.

7 Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 3,578, So. Dist. Ohio, Western Division, Foreclosure Southern-Eastern Division; entered Oct. 20, 1883.

Central Trust Co. vs. T., C. & St. L. R. R. Co., No. 3,579, So. Dist. Ohio, Western Division, Foreclosure Iron R. R. Division; entered Oct. 20, 1883.

Said exhibit is marked

T., C. & St. L. R. R. Cases.

Exhibit filed by bondholders and purchasers of the Iron Railroad, mortgage division, in support of their claim to the net earnings of said division while in the hands of receivers.

Your petitioners say that said T., C. & St. L. R. R. was about eight hundred miles long and extended through three States, as follows: From Toledo, Ohio, through Delphos in the same State to Kokomo, Indiana, and thence west to East St. Louis, Illinois. Also from said Delphos south through Dayton to Cincinnati. Also from said Dayton southeast to Ironton, Ohio.

That said road and company was made up by the consolidation of many small companies and roads, each of which had made two mortgages, one of its property and the other of its income, to secure first mortgage and income bonds respectively, which mortgages had been made and the bonds thereby secured had been issued prior to any of the litigation herein referred to.

That so much of the line of said consolidated railroad as was covered by each of said first mortgages respectively, was known as a mortgage division thereof, which divisions and mortgages were located and named as follows:

1. The Toledo Terminal, being the terminal of said system at Toledo aforesaid.

2. The Toledo Division, extending from said terminal through Delphos, Ohio, to Kokomo, Indiana.

3. The Western or St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois.

8 4. The Dayton Division, extending from said Delphos to Dayton, Ohio.

5. The Southeastern or Dayton South and Southeastern Division, extending from Dayton to Dean Station, with a branch to Wellston.

6. The Cincinnati Division, extending from said Southeastern Division at a point a few miles out of Dayton, to Lebanon.

7. The Cincinnati Northern Division, extending from said Lebanon to Cincinnati.

8. The Iron Railroad Division, extending from Dean Station to Ironton.

That each of said divisions was mortgaged separately as aforesaid by the constituent company owning the same prior to said consolidation, and all said mortgages were made to the Central Trust Company of New York, except that upon said St. Louis or Western Division, which was made to said Central Trust Company and the late Hon. Thomas A. Hendricks of Indiana.

That there was no consolidated or blanket mortgage covering or purporting to cover the whole of the property of said T., C. & St.

L. R. R. Co. or any made to cover more than one of said mortgage divisions as aforesaid.

Second: That said Iron Railroad, while an independent corporation, made a first mortgage of all its property, which has been foreclosed in the proceedings in said case numbered 3,579 in the Southern District of Ohio, Western Division; after making said mortgage said road purported to be consolidated with a certain Toledo, Delphos and Burlington Railroad, which last-named corporation by subsequent consolidation became a part of said Toledo, Cincinnati and St. Louis Company.

Third: That the first proceedings pertinent to the matters herein contained, was the filing of a certain bill in equity by one Grenville D. Braman, a judgment creditor of said Toledo, Cincinnati and St. Louis Railroad Company, in the Circuit Court of the United States for the Southern District of Ohio, on or about August 1, A.D. 1883, under and in pursuance of which one Edward E. Dwight was appointed a receiver of all said property in so far as said courts had jurisdiction over the same.

9 Said Braman bill was never filed nor was any receiver ever appointed under the same in the Southern District of Ohio, Western Division. Said bill was filed in the courts aforesaid, the appointments under the same and said intervening petitions were substantially alike or, proper formal charges being made, identical, and your petitioners refer to all of them, making them a part hereof. A copy of said bill and of said appointment as entered in the Southern District of Illinois, is contained in said exhibit and marked respectively "A" and "B."

Fourth: That at the hearing on application for a receiver under said bill, counsel for the first mortgage bondholders of the Iron Railroad was present and was heard upon an intervening petition filed in said courts in behalf of said bondholders for the protection of the special equities pertinent to said Iron Railroad and for the preservation of its separate rights, property, income and interests. Said petitions were substantially alike or identical. (See in evidence taken by Hon. J. D. Cox, Master, statement of J. C. Coombs, and copy annexed Exhibit Cox's Evidence. Exhibit C). And in pursuance thereof in the decrees made upon said application for a receiver, power and authority were reserved "to any party interested in any one of the constituent companies out of which the consolidated company was formed, to apply to the court for direction to the receiver to keep an account of the receipts and expenditures of such constituent company, so as to preserve and secure any special equities which the court may find to exist in favor of such constituent company." Whereupon such application was immediately made in behalf of said first mortgage bondholders of said Iron Railroad, and thereupon the receiver was directed to keep and did keep a separate account of the earnings and expenses of said Iron Railroad so long as he assumed

to hold possession thereof under and by virtue of his said appointment; and like application was made in behalf of the Cincinnati Northern Railway, a certain other constituent company of said Toledo, Cincinnati and St. Louis Railroad Company, and an order was thereupon on August 17th, 1883, entered upon the record in said cases for keeping the accounts of said Iron Railroad separate. (Exhibit "D.")

Fifth: That afterwards, to-wit: On or about the 14th day of August, 1883, the trustee under the first mortgage of said Cincinnati Northern Railway, to wit, the Central Trust Company of New York, filed in the Circuit Court of the United States for the Southern District of Ohio, Western Division, a bill to foreclose said mortgage, making said Grenville D. Braman and said Toledo, Cincinnati and St. Louis Railroad Company and others, parties defendant thereto; which cause is numbered 2,554 on the equity docket of said court. (Exhibit "E.")

Sixth: That thereupon application was made by said Receiver Dwight to said Circuit Court of the United States for the Southern District of Illinois, for a restraining order and injunction upon said Central Trust Company of New York to enjoin the prosecution of said foreclosure suit begun in said Circuit Court of the United States for the Southern District of Ohio, or any application for any receiver under the same. (Exhibit "F.")

Seventh: That said Toledo, Cincinnati and St. Louis Railroad and said Grenville D. Braman, both appeared in said foreclosure suit in said Circuit Court of the United States for the Southern District of Ohio, Western Division, and filed their several pleas to said bill setting up the appointment of said Dwight as receiver by said Circuit Court of the United States for the Southern District of Illinois, the District of Indiana and the Northern District of Ohio, Western Division. (Exhibit "G.")

Eighth: That afterwards, to-wit: On the 29th day of Sept. A.D. 1883, said cause of Grenville D. Braman against said Toledo, Cincinnati & St. Louis Railroad Co., and others, then pending as aforesaid, came on to be heard in the Circuit Court of the United States for the Northern District of Ohio, Western Division, before his Honor Judge Baxter, Circuit Judge in said Circuit, and his Honor, Judge Walker, sitting in said court, and his Honor, Judge Drummond, Judge of the Circuit Court of the United States for the Seventh Circuit, upon an application of said Central Trust Co. of New York, for leave to prosecute said suit in equity to foreclose said mortgage against Cincinnati Northern Railway Company and others in said Circuit Court of the United States, for the Southern District of Ohio, Western Division; and to set aside the order theretofore made in said suit brought by said Braman appointing said Dwight a receiver aforesaid.

And thereupon it was ordered in said suit, among other things, as follows, to-wit:

"And the court, being fully advised in the premises, now grants leave to said Central Trust Company to prosecute said suit in
11 the Southern District of Ohio. And the court further orders that the order heretofore made in this cause, appointing a receiver for said property, be and the same is hereby ordered to stand until Oct. 20, 1883, and the said Receiver, E. E. Dwight, is hereby ordered to be discharged on the 20th day of Oct. and to re-deliver on that day the possession of the Toledo, Cincinnati and St. Louis Railroad so far as the same is situated within the State of Ohio, together with all the rolling stock, material, supplies, and all other property in his possession, belonging to said Co., unto the defendant, the Toledo, Cincinnati and St. Louis Railroad Company, such delivery to be made and completed on October 20th, 1883. And said receiver shall pay any money in his possession into court and file his account at that date." (Exhibit "H.")

Ninth: That at the time making and entry of said order it was understood by all parties in interest upon the announcement in effect by his Honor Judge Baxter that the same appeared to be proper and necessary; that the foreclosure proceedings would be begun on bills to be filed on said 20th day of October, by said Central Trust Company, (who was the trustee in all of the mortgages made by the several mortgage divisions of the said Toledo, Cincinnati and St. Louis Railroad Co., lying within the State of Ohio) for the purpose of foreclosing the mortgages on said Ohio Division of said road. But that as to so much of said railroad as lay in the State of Indiana and Illinois his Honor Judge Drummond reserved any expression of his determination as to what proceedings should be had in the Seventh Circuit of the United States. (See Coombs' Evidence in Exhibit Cox's Evidence.)

Tenth: That afterwards, to-wit: On said 20th day of October aforesaid said Central Trust Company of New York filed its several bills of foreclosure to foreclose said mortgages upon said several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad lying within said State of Ohio, in addition to the bill already filed as aforesaid to foreclose said mortgage on said Cincinnati Northern Railway Division, to-wit, a bill to foreclose the mortgage of the Cincinnati Division, so-called; a bill to foreclose the mortgage on the Dayton Railroad Division, so-called; a bill to foreclose the mortgage on the Dayton and South Eastern Division, so-called; and a bill to foreclose the mortgage on the Iron Railroad Division, so-called; which causes were numbered on the equity docket in said court 3576, 3577, 3578, and 3579. And at or about the same date a bill to foreclose the mortgage on the Toledo Terminal, and one to foreclose the Toledo Division in Ohio, numbered respectively 380 and 382, in said Circuit Court for the Northern District of

Ohio, at Toledo; and a bill to foreclose the Toledo Division
12 in Indiana, numbered 7706, in said Circuit Court in the District of Indiana; and said Central Trust Company and Thomas A. Hendricks, joint trustees under said mortgage on said St. Louis or Western Division, also on or about the same date filed a bill to foreclose that mortgage, in said Circuit Court of the United States for the Southern District of Illinois. Said bills proper, formal and descriptive changes being made, were substantially alike. Your petitioners refer to all of them, making the same a part hereof. (Exhibit "I.")

Eleventh: That said causes coming on immediately on the application for a receiver of the property sought to be foreclosed in each of said bills respectively, it was early announced in substance by his Honor Judge Baxter holding said court, that he should appoint the said man receiver of said several divisions for the purpose of securing harmony of operation, but that such receiver should be in effect a separate receiver of each division; and William J. Craig was appointed such receiver in each of said cases, in said Sixth Circuit and State of Ohio. (Exhibit Cox's Evidence.)

Twelfth: That in the bill to foreclose said mortgage upon said Iron Railroad Division, no other property was mentioned or described than that covered by the several and separate mortgage of said Iron Railroad; and no receiver was asked for in said case except of said property. And in the decree appointing said Craig receiver of said property it was provided among other things as follows: "That William J. Craig be and he hereby is appointed receiver of all and singular the premises, property, money and assets described in the said bill of complaint in this suit * * * * to take possession of, maintain and operate the said railroad, premises and property described in said bill of complaint herein, being all and singular the right of way and line of railroad of the said Iron Railroad Company, as the same was on the first day of August, 1881, or has since been constructed or acquired between the Ohio River and Upper Township in Lawrence County, Ohio, and the south line of Jackson County in said State, including its lines from Ironton to Centre Station; its line from Ironton to Sarah Furnace; its line from Aetna Station to Ellisonville, also the Bartels branches, all in said Lawrence County, together with all and singular the right of way, roadbed then or since made, its tracks then or since then laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine houses, machine shops, buildings, erections in any way then or since then appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies,
13 tools and fixtures, then or thereafter held, owned or acquired by said Iron Railroad Company for use in connection with its line of railroad aforesaid, together with all and singular the powers

and franchises thereto belonging, and the tolls, incomes and revenues to be levied or derived therefrom, as fully described in said bill of complaint filed in this suit, reference to which for greater certainty is now had and made. And said receiver is hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for and operate said railroad, premises and property, to make reports of his acts and doings to this court every two months, at least, or oftener if required thereto by the court, to collect and receive the tolls, issues, rents and profits of said premises, railroad and property, and out of the same to make such repairs as may be necessary to preserve and keep the same in safe and proper condition. And said receiver is hereby authorized to operate said railroad in connection with any other or others of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Co., of which he may be appointed receiver. But is hereby directed to keep the accounts of the earnings, income, issues, rents, profits and expenditures of the said Iron Railroad Company, separate from the earnings, issues, rents, profits, income and expenditures of the other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company. And said defendants, the said Iron Railroad Company and the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company are hereby ordered and directed to deliver to the said William J. Craig, Receiver, possession and control of all the property, rights, franchises, privileges and assets of every kind above described. And it is further ordered that said receiver make and file a true inventory of all cars, engines, rolling stock, material and supplies above described, as well as of all other personal property coming into his possession by virtue of this order. And said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads so that the receipts therefrom may be apportioned as the court may hereafter direct."

And thereupon said William J. Craig took possession of all and singular said property as described in said mortgage, bill of complaint, and decree; and on the 23rd day of Oct., 1883, filed his separate bond in said case in the sum of $10,000.00, the condition whereof is that he "Shall faithfully account for what comes to his hands or control as such receiver, etc." And afterwards, to-wit: On the first day of Dec., 1883, he filed in said case his inventories of rol-
14 ling stock, station furniture, tools, materials, machines, supplies, etc., of said Iron Railroad, which came to his possession as such receiver. And your petitioners say that like proceedings were then had in all said foreclosure cases in said Sixth Circuit, that proper changes in amount of bonds and in other formal or descriptive matters being made, said appointments, inventories and bonds were

alike in all said cases and are all made parts hereof. (Exhibit "J," "K," "L.")

Thirteenth: That, as appears by the evidence taken in this case before the Hon. J. D. Cox, Master, as hereinafter mentioned, at the time of said Craig's appointment by said court as aforesaid, application was made to said court in behalf of your petitioners by the counsel of said Central Trust Co. of New York, complainant in said case, that the receiver be compelled to keep the funds (of said Iron Railroad) separate, and it was urged upon said court that a separate account would only inform your petitioners how much has been stolen from them. The court replied that to require the receiver to keep a separate bank account for the Iron Railroad would be too burdensome, but that upon the final hearing of the cause, if it appeared by accounts that any part of the money had been taken for the benefit of another by the receiver, it would be ordered to be restored, and if the receiver did not have it, it should be taken out of the proceeds of sale. (Exhibit Cox's Evidence.)

Fourteenth: That said William J. Craig gave a several and separate bond in each of said other several cases in which he was appointed receiver as aforesaid, for his separate undertaking in respect of his said appointment in each of said cases, and filed separate inventories as your petitioners are informed in each of said cases.

Fifteenth: That at the time of the appointment of said Craig, receiver in this case, as aforesaid, no bill or suit had been brought by said Grenville D. Braman, or was pending in said Circuit Court of the United States for the Southern District of Ohio, in the Western Division thereof, which court alone of the courts of the United States had property jurisdiction of said Iron Railroad; nor was any such bill ever filed in said court at any time thereafterwards; nor was said Craig directed in said suit for said foreclosure against said Iron Railroad Company, nor in any of the other of said foreclosure suits in said Circuit Court of the United States for the Southern District of Ohio, Western Division, to succeed to or otherwise take from said Receiver Dwight any of the property or estate of which said Dwight was or may have claimed that he had been appointed a receiver
15 in said case brought by said Grenville D. Braman; nor was said Dwight in any of said cases of foreclosure ordered to make any delivery of any of the property therein sought to be foreclosed to said Receiver Craig, or otherwise recognized by said court as having possession thereof, but said several companies were ordered and directed, as in case of the Iron Railroad Company herein set forth, to deliver said mortgaged property to said receiver as if the same were in the hands or possession of said constituent or consolidated companies, mortgagors, and successors of mortgagors under said mortgages; nor was there ever in any of said cases in said Circuit Court of the United States for the Southern District of Ohio, Western Division, any order, judgment, or decree extending or purporting to extend said alleged

Dwight receivership over said mortgagee's interest in said several mortgage divisions or continuing the same in said Craig, Receiver as aforesaid. (Exhibit "M.")

(*A*): Said Braman's bill or the receivership under the same was never dismissed in any court in the Seventh Circuit, but in the Toledo Division foreclosure case in the District of Indiana, No. 7,706, on November 27, 1883, on motion of the mortgagee, complainant, said receivership of said Dwight was extended over said mortgagee's interest (Exhibit "N"); and on the next day in the same case and court on like motion of said mortgagee, said Dwight's resignation of his said receivership was accepted and said Craig was appointed his successor (Exhibit "N" "O"), and on the twenty-eighth day of the same month, like resignation of Dwight and appointment of Craig as his successor was entered in said Braman case No. 7,672 in said court. (Exhibit "P.")

(*B*): On like motion of the mortgagee in the St. Louis Division foreclosure case in the Southern District of Illinois on November 26, 1883, said Dwight's receivership under the Braman bill was extended over the mortgagee's interest, and on the twenty-eighth day of the same month on like motion of the mortgagee in both said cases said Dwight's resignation was accepted and said Craig was appointed his successor. (Exhibit "Q.")

(*C*): That because of a controversy between the trustees under the mortgage of the St. Louis Division which is set forth in the two bills next hereinafter mentioned, and which as your petitioners are informed, arose through fear of jurisdictional conflicts, no bill was brought by or in behalf of the mortgagee to foreclose said mortgage on said St. Louis Division in the State and District of Indiana, until about twelve days prior to the sale of the Iron Railroad in foreclosure,
when on June 16, 1884, such a bill was brought by Edward F.
16 Leonard, a bondholder and citizen of Illinois, in cause No. 7,814,
in said District of Indiana, in which bill both said Central Trust Company and said Hendricks, Trustees, were made defendants; and in the same court on the next day, June 17, another bill was brought for like purposes by said Central Trust Company, in which said Hendricks was made a defendant, which bills were on July 2nd following consolidated under No. 7,814. (Exhibits "S, T, U.") No receivership or extension thereof appears to have been made or extended in said cases over the mortgagee's interest until McNulta's appointment July 2, 1885. (Exhibit "V.")

Sixteenth: That said Grenville D. Braman, said Iron Railroad Company, said Toledo, Delphos and Burlington Railroad Company, and said Toledo, Cincinnati and St. Louis Railroad Company appear in said Iron Railroad foreclosure case only as parties defendant and as such filed their appearance herein, but made or filed no answer or other pleading to the allegations of said bill, so that all said allega-

tions were taken to be confessed, as hereinafter mentioned. (Exhibits "W, X, Y.")

Seventeenth: That afterwards, to-wit: On the 29th day of January, 1884, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, an application was made in behalf of the plaintiff in said suit brought by said Braman for leave to amend said bill, so that the receivership originally created under said bill, and notwithstanding the order to dismiss said receiver made upon the 29th day of Sept., A.D. 1883, as aforesaid, might be revived or continued so as to cover any property belonging to said consolidated Toledo, Cincinnati and St. Louis Railroad Co., and not included in any of the mortgages upon the several mortgage divisions of said constituent companies, and such amendment was allowed and an order in accordance with the purposes thereof as aforesaid was made in said court in said B. Northern District of Ohio, Western Division. (Exhibit "Z.") And your petitioners say that afterwards, to-wit: On the tenth day of December in said year 1884, A. J. Ricks, Esq., was appointed a special master in said case to ascertain and report to said court what, if any, property said T., C. & St. L. R. R. Co. own subject to the order or process of the court for the payment of its debts, which is not covered by any mortgage made by said company, etc. (Exhibit "A" 2.); that said master made and filed in said case and court his report; and that said court on the petition of one Jenkins, and in said case afterwards, to-wit: On December 3, 1886, found that there was no such property. (Exhibit "B" 2.)

17 Eighteenth. Afterwards, to-wit: On the 12th day of Feb., A.D. 1884, it was ordered, adjudged and decreed in said Circuit Court of the United States for the Southern District of Ohio, Western Division, that said bill of complaint in this case of said foreclosure of said mortgage of said Iron Railroad be taken *pro confesso;* and subsequently on the 31st day of March A.D. 1883, a decree for the sale of said Iron Railroad in pursuance of said foreclosure proceedings was made in said court, in which, among other things, said court found relating to the several consolidations hereinbefore mentioned, subsequent to the date of said mortgage of said Iron Railroad, as follows:

"And the court finds that the several consolidations were subject and subordinate to the rights of the holders of the bonds secured by the several mortgages hereinbefore mentioned, and without prejudice to the right to sell the said property of said Iron Railroad Company by virtue of the said mortgage of August 1st, 1881."

And thereupon upon default in performance of condition of said mortgage, as provided in said decree, said court ordered, adjudged and decreed that said Iron Railroad, and subsequent consolidated companies and said Grenville D. Braman, and incumbrances subsequent to said first mortgage, be forever barred and foreclosed, "of,

in and to said mortgage premises, property, rights, assets and franchises, every part or parcel thereof, described or embraced in said first mortgage, made by said Iron Railroad Company on said 1st day of August, 1881," * * * * * "which said mortgaged premises, property, assets, right and franchises are hereinbefore, and in said bill of complaint, to which reference is now had for that purpose, fully described, including all property embraced within the terms of said mortgage acquired by said Iron Railroad Company since the date of said mortgage, and owned by it at the time of the consolidation with the said Toledo, Delphos and Burlington Railroad Company," which was the property mentioned and described, which was ordered to be sold by said judgment and decree, and in said order of judgment and decree said receiver of said Iron Railroad was, among other things, required to transfer and convey to the purchaser or purchasers at said sale, "all property and rights which he may have acquired in the administration of said trust." Substantially like orders for the taking of the bills, filed *pro confesso*, and decrees for the sales of the mortgaged properties, and like findings with proper, formal and descriptive changes were made and entered at the same time in said cases numbered 18 3,576, 3,577, 3,578, pending in said court, to all of which orders and decrees your petitioners refer, making the same a part hereof. (Exhibits C 2, D 2, and special certificate thereto.)

Nineteenth: Afterwards, to-wit: On the 5th day of April A.D. 1884, in said Circuit Court of the United States for the said Southern District of Ohio, Western Division, an order of reference was entered in all said cases hereinbefore mentioned, pending in said court, to-wit: Nos. 3,554, 3,576, 3,577, 3,578 and 3,579, by the Hon. John Baxter, Judge of said Circuit Court, to Jacob D. Cox, Esq., as Special Master, to inquire and state to the court, among other things, as follows:

"And it is further ordered that the master, in making the inquiries and statements herein directed, consider and treat the several mortgages under which the receiver has been appointed as embracing and representing distinct and independent interests, and that the receiver render and the master states such accounts as may be necessary. That said master inquire and state what, if anything, may be due from the one interest or estate to the other, and what proportion each should bear in request of any charges and liabilities in the premises, and to inquire and state to the court what property, real, personal and mixed, is covered by said several mortgages."

And your petitioners are informed that like orders were entered at or about the same time in all the courts in the Sixth and Seventh Circuit of the United States in which any proceedings were pending, either under said bill filed by said Grenville D. Braman, or bills for the foreclosure of the mortgage division of said Toledo, Cincinnati and St. Louis Railroad. Said order of reference, proper formal

changes being made, was substantially alike or identical as entered in said cases then pending as aforesaid, to all of which your petitioners refer, making the same a part thereof. (Exhibit "E" 2.)

Twentieth: That said Special Master J. D. Cox immediately began his hearings under said order of reference; and "it being desired, by counsel for the various parties to said suits, that a preliminary report should be made to the Circuit Court of the United States, for the Southern District of Ohio, at as early a day as might be, so that the sale of certain portions of the consolidated Toledo, Cincinnati and St. Louis Railroad within said district, ordered to be made on the 28th day of June, instant, might be made with as full knowledge as possible of the situation of said several parts of
19 the railroad, as to liens, as to the liability for receiver's debts, and as to the rolling stock and other property, the master, in accordance with such wish" filed his preliminary report in said Circuit Court of the United States for the Southern District of Ohio, Western Division, on the 26th day of June A.D. 1884; and said report was also filed in said Circuit Court of the United States, for the District of Indiana, on the 17th day of July, 1884, including said consolidated causes Nos. 7,814 and 7,815 pending in said court, wherein said report was adopted by stipulation and order (Exhibit 2nd, E 2); to which report your petitioners crave leave to refer, and which report contains among other things, the following:

P. 26. "The receiver having, under orders of the court, kept his account in such a manner as to show the earnings and expenses of the several divisions of the road separately, since Nov. 1st, 1883, an analysis of such accounts shows an excess of expenses over income on all the divisions of the roads except the Iron Railroad, as stated below. The account of the Iron Railroad shows a balance of income over expenses, amounting, at April 1st, to the sum of $33,716.37, as above noted.

EXCESS OF EXPENDITURES OVER INCOME.

Toledo Terminal,	Nov. 1, 1883, to	Apr. 1, 1884	$3,259.79
Toledo Division,	" 1, 1883, to	" 1, 1884	104,585.04
St. Louis Division,	"	"	61,682.50
Dayton Division,	"	"	15,222.60
Dayton and South-Eastern Division,	"	"	38,633.79
Cincinnati Division,	"	"	4,652.02
Cincinnati Northern Division,	"	"	21,098.18
On all Divisions Aug. 1, 1883, to Nov. 1st, 1883, except the Cincinnati Northern			26,583.05
Cincinnati Northern Railway, Aug. 1, 1883, to Nov. 1, 1883			3,355.05
Total of such excess to April 1, 1884			$279,072.18

The receiver has expended for corporation debts ordered to be paid, above the sum collected from the corporation assets	$58,915.62
Receiver's certificates, issued for debts on account of Frankfort and State Line Railroad	113,941.89
Paid on account of Toledo Terminal Trust	86.75
Receiver's certificates issued for rights of way on Cincinnati Northern Railway	25,176.20
Taxes yet to be paid (See below page 52)	
Rentals upon rolling stock	403,997.00
Probable deficit for April, May and June	100,000.00
Amount brought over from last page	279,072.18
Total	$981,189.64

being the same amount before reported as the excess of receiver's liabilities over assets on July 31st, 1884.

"The distribution of this indebtedness to the several divisions of the railroad, which the master finds to be equitable, is hereinafter reported."

P. 50. "In pursuance of the orders of the court, the receiver has for some months kept the operating expenses of the road separately distributed to the several divisions, as such expenses were incurred. In doing this he kept separate accounts of all expenses which were properly local under the customary rules of railroad accounting; and the 'general expenses' which could not be treated as local, he divided upon a scale of percentage based chiefly upon the miles in length of the several parts of the road, but modified by the extra value of the property and the earning capacity of the terminals of the line at Toledo and at Cincinnati. On recommendation of the receiver, the court has authorized the allowance of an extra share of the earnings (known as 'arbitrary' among railroad accountants) to these terminals, and in the distribution of general expenses, the receiver added to the proportion of these terminals on a mileage basis, an addition proportionate to this 'arbitrary.' The master finds that this division by the receiver is a fair one, and that it would be impracticable to change his accounts by altering it."

P. 54. "The division of the amount paid by the receiver upon corporation debts in excess of his receipts from corporation assets, the master finds should be done upon the basis of the relative
21 expenses of the several roads, as that amount (in the impossibility of tracing its items) is presumably made up by the aggregate expenses of the divisions of the roads in the usual proportions. It included pay rolls in part, and these were due upon the Iron Railroad as well as the others. The master therefore states the distribution of this payment of $58,915.62 (see page 27) in the pro-

portions of the ordinary expenses of said divisions (exclusive of car rentals) as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.63	$960.32
Toledo Division	26.81	15,795.28
Dayton Division	10.87	6,404.13
D. & S. E. Division	24.08	14,186.88
Iron Railroad	2.08	1,366.84
Cincinnati Division	1.76	1,036.92
Cincinnati Northern Ry	10.00	5,891.56
St. Louis Division	22.53	13,273.69
Total	100.00	$58,915.62

"The estimated deficit in the receiver's earnings, for April, May, and June, of $100,000, being based upon separate accounts kept and the exact application of each division's earnings to its own expenses, the master finds, should be divided in the proportion of the deficits which have already accrued since that mode of accounting was adopted under the order of the court.

"In this case the Iron Road will have a probable surplus which the receiver will have to return to it, and does not therefore appear in this list of deficits.

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.58	$1,580.00
Toledo Division	30.05	3,005.00
Dayton Division	7.36	7,360.00
D. & S. E. Division	18.70	18,700.00
Cincinnati Division	2.25	2,250.00
Cincinnati Northern Railway	10.21	10,210.00
St. Louis Division	29 85	29,850.00
Total	100.00	$100,000.00

"During the first three months of the receivership, and before the separation keeping of accounts of the divisions were completely
22 in operation, there was a deficit of $26,583.21 upon the divisions, excluding the Iron Railroad and the Cincinnati Northern (See P. 26); this has to be divided among the divisions on which it accrued, and the master finds that it should be in the proportion of their ordinary expenses to each other, on the same principle as was adopted in regard to the division of $58,915.62 above, but reducing the number of parties among whom it is divided, as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.85	$491.79
Toledo Division	30.58	8,129.15
Dayton Division	12.40	3,296.32
D. & S. E. Division	27.46	7,299.75
Cincinnati Division	2.01	534.32
St. Louis Division	25.70	6,831.88
Total	100.00	$26,583.21"

Said reports were identical as filed in said cases and courts, reference to all of which is hereby made, making the same a part hereof. (Exhibits "F"2, "G"2, "H"2.)

Twenty-first: Afterwards, to-wit: On the 28th day of June, A.D. 1884, said Iron Railroad was sold in pursuance of said decree of foreclosure and sale to John C. Coombs, as Trustee, for the sum of $500,000.00 by Simeon Harris, who had been theretofore appointed by said Circuit Court of the United States for the Southern District of Ohio, Western Division, a Special Master Commissioner to make said sale, and who on the same date reported said sale to said court; on which day a motion was filed by the counsel for said Central Trust Company of New York for the confirmation of said sale. And substantially like reports and motions were made at the same in respect of the sales and confirmation thereof of three other divisions sold at the same time in cases in said court, numbered 3,576, 3,577, 3,578. (Exhibit "I" 2.)

Twenty-second: That afterwards, to-wit: On the 18th day of July, A.D. 1884, in the Circuit Court of the United States for the Southern District of Ohio, Western Division, said case came on to be heard upon said application for the confirmation of said sale before the Hon. Stanley Matthews, Justice of the Supreme Court, and the Hon. George R. Sage, District Judge, holding said court; and said sale was duly confirmed; and said decree confirming said sale contained, among other things, the following:

23 "And it appearing to the court by the report of Jacob D. Cox, Esq., Special Master heretofore appointed in this cause, that the earnings of said Iron Railroad, during the time the same has been operated by the receiver appointed in this case, are largely in excess of the expenditures incurred by said receiver in operating the same, the court finds it unnecessary to require now payment into court of the sum of $50,000,00, being the amount ordered by this court in the decree of sale hereinbefore entered to be paid in cash at this time."

And in the decrees entered at or about the same time in and by said court in affirmation of the sales of certain other divisions of said Toledo, Cincinnati and St. Louis Railroad, to-wit: The Cincinnati Division, the Dayton Division, and the Dayton and Southeastern Division, which were sold in like proceedings on the same day as said

Iron Railroad, it was expressly ordered, adjudged and decreed in substance, on account of the earnings of said Iron Railroad which had been used by the receiver for the benefit of the other mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad, that the amount of money, which would otherwise have been required to be paid into said court at that time by the purchaser of said Iron Railroad, should be furnished one-fifth thereof by the purchasers of said Cincinnati Division and two-fifths thereof by the purchasers of each said Dayton Division and said Dayton and Southeastern Division respectively. (Exhibit "J" 2.)

Twenty-third: That on the 26th day of July, A.D. 1884, said Special Master, J. D. Cox, in pursuance of a direction thereto of said Circuit Court of the United States for the Southern District of Ohio, Western Division, filed in said court a second report containing an analysis of the receiver's indebtedness so as to show just what proportions of the same was uncontested and the proportionate parts of the same which upon the ratios above reported should be borne by said several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad; which report, among other things, contained the following, wit:

"Bringing together the four classes of items above enumerated and tabulating them we shall have the total amount of this undisputed indebtedness, and the amount to be contributed by each division is included in their deficits, and is part of the undisputed indebtedness of the receiver, subject, however, to be reduced by the proportion of car rentals, &c., charged that road, if the same shall be approved by the court as reported in a former report of the master. The
24 amount of $1,366.84 charged the Iron Railroad in table four as its part of corporation debts, paid by receiver, will be also offset against its credit in this manner;" said report contained four tables, showing the undisputed indebtedness of the several mortgage divisions of the Toledo, Cincinnati and St. Louis Railroad down to April 1, A.D. 1885.

Said report is herein referred to and made a part hereof. (Exhibits K2, H2.)

Twenty-fourth: That afterwards, to-wit: On the 29th day of July, A.D. 1884, in the Circuit Court of the United States for the Southern District of Ohio, Western Division, before the Hon. Stanley Matthews, Justice of the Supreme Court, and the Hon. George R. Sage, District Judge, holding said court, said causes, to-wit: Nos. 3,554, 3,576, 3,577, 3,578 and 3,579, came on further to be heard upon said report of said Master, J. D. Cox, filed therein on the 26th day of said July, A.D. 1884, aforesaid; and thereupon said court proceeded to take into account certain court expenses and counsel, receiver's and commissioners' charges for services incurred in said cases, and provided for the payment thereof, and the distribution of said burdens over said divisions, and for the payment so much there-

of as pertained to the Iron Railroad, out of any funds which were or might be to its credit in said court, but again required no money to be paid into court on account of said charges by said purchasers of said Iron Railroad; and said court further then and there considered said second report of said J. D. Cox, and ascertained the amount of money necessary to pay the undisputed indebtedness of the said several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad, which had been theretofore sold as hereinbefore mentioned, as shown in tables contained in said second report, and rejected one only of said tables, to-wit, the third table therein contained, which provided for the payment of $26,583.21 deficit incurred by said Receiver Dwight in operating said roads under said judgment creditor's bill, it not having then been determined in said Circuit Court of the United States for the Southern District of Ohio, Western Division, that any indebtedness of said Dwight should be recognized or paid, and said court confirmed all the other undisputed indebtedness of said divisions so sold as aforesaid as found in said report. And said report expressly included, as a part of said indebtedness as hereinbefore quoted, the indebtedness as stated in said report of said other divisions to said Iron Railroad, for and on account of the net earnings of said Iron Railroad diverted for the benefit of said other divisions, amounting at the date to which said report brought down said
25 account, to-wit, April 1, 1884, to $33,716.37; and the order of distribution, judgment and decree then and there passed by said court contains the following:

"And the court further finds that the undisputed indebtedness of said William J. Craig, incurred as receiver in causes No. 3,576, 3,577, 3,578, and 3,579, of the above entitled causes, amounts to the sum of $109,813.13, of which amount the sum of $7,938.94 is due by said receiver in cause No. 3,578, of the above entitled causes, and the sum of $28,986.73 is due by him in cause No. 3,577, of the above entitled causes, and the sum of $71,520.67 is due by him in cause No. 3,578, of the above entitled causes, and $1,366.84 is due him in cause No. 3,579, of the above entitled causes; it is therefore hereby further ordered, and adjudged and decreed that the respective purchasers in causes No. 3,576, 3,577, and 3,578, of the above entitled causes, to-wit, the purchasers of what is known as the Cincinnati Division, and the purchasers of what is known as the Dayton Division, be and they hereby are directed to pay within twenty days from the entry of this decree to J. B. Foraker, Esq., or upon his order as attorney for said William J. Craig, sufficient money to pay in full the amount of said undisputed indebtedness of said receiver, in said several causes respectively, as the same is hereinbefore respectively found and set forth."

Which undisputed indebtedness of each of said divisions was made up, as shown by said report, by including in the items thereof its

share and proportion of the ascertained amount of the Iron Railroad's claim.

And also by including in the same proportions anticipated deficit, which must necessarily arise in part from an increase of said Iron Railroad's claim for the remainder of the whole period covered by said receivership.

And your petitioners have been informed that said divisions complied with said order so far as to furnish said sums to the amount required of them, as therein provided, except that it appearing that said Cincinnati Division and said Dayton Division might not have sold for sufficient to pay their indebtedness in full, they were subsequently in said decree permitted to pay into said court but 50 per centum of the amount of their said indebtedness aforesaid; wherefore there should now for a long time have been in said Circuit Court of the United States for the Southern District of Ohio, Western Division, a large sum already paid by said other divisions
26 as aforesaid for and on account of said claim of said Iron Railroad, to-wit: 18 71-100 per cent. of the $33,710.37, the amount of said claim of said Iron Railroad as brought down to April 1, 1883, as aforesaid, paid in by said Dayton and Southeastern Division; 7 36-100 per cent. of the amount of the said claim paid in by said Cincinnati Division, but for the fact that your petitioners have been informed that said sums so furnished were allowed to be applied on account of certain indebtedness common to some or all of said divisions paying the same as aforesaid and other mortgage divisions of said road running from said Toledo to St. Louis as aforesaid, and that upon the accounting of said last-named divisions with said mortgage divisions lying south of Delphos and so sold as aforesaid there ought of necessity to be paid back to said last-named divisions or to their credit, and so for the benefit of said Iron Railroad, said sums already so furnished and paid by said other divisions for and on account of their respective indebtedness to said Iron Railroad, as aforesaid.

Said decree of July 29th, 1884, was the same as entered in all said cases, including the Iron Railroad case in the Southern District of Ohio, Western Division. (Exhibit "L" 2.)

Twenty-fifth: That both said first report of said Master J. D. Cox and said second report of said master were filed in the courts and cases and at the times aforesaid, as hereinbefore mentioned; that in no court in which either of said reports was filed was there ever any exceptions taken, filed, claimed or alleged to the severation of the interests, rights, duties, and liabilities of the several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad Company, as therein found and reported; nor to said claim of said Iron Railroad of the validity thereof and the percentage and proportion thereof which should be borne and paid by the other mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad according

to the tables applicable and applied thereto in said reports; nor to any of the percentage or proportions of the liabilities, obligation or benefits to which each, any or all of said divisions were therein found to be subject or entitled, except that certain persons who had been admitted to said Toledo terminal foreclosure case did, on August 15, 1884, purport to file certain additional exceptions to said preliminary report, although said report was never filed in said court for the Northern District of Ohio, excepting among other things to said Iron Railroad claim on the ground of the insufficiency and indefiniteness of the evidence that supported it; and except that on like grounds in certain additional exceptions to said report filed on August 14, 1884, the local counsel of said Central Trust Com-
27 pany in the foreclosure case of the Toledo Division in the District of Indiana purported to file such exceptions for the complainant. (Exhibit "M" 2, "N" 2.)

Your petitioners on information say that the property in said Toledo terminal case, in which case said intervening plaintiffs purported to file exceptions to said reports, was afterwards found to pertain to said Toledo Division.

And as to the exceptions in the District of Indiana, your petitioners on information and belief say that said local counsel undertook to file the same without knowledge of or authority from the complainant, since such complainant, being common mortgage trustee of all said divisions, was trustee also for the Iron Railroad bondholders, and should, if active in the matters at all, either have supported the claim in behalf of the Iron Railroad or opposed it in behalf of the Iron Railroad, or opposed it in behalf of all other divisions, and did not intend to oppose it in behalf of but one division alone. The general counsel of said Central Trust Company, either in New York or elsewhere, never took exception to said claim.

Your petitioners had no knowledge of either of said alleged exceptions aforesaid till long after said Cleveland decree. And also, except that exceptions were filed thereto in behalf of your petitioners, to so much of said report as found said Iron Railroad property in any respects liable for or on account of the narrow-gauge equipment; nor was there ever any appeal claimed or allowed from any of the orders, judgments or decrees hereinbefore mentioned, based upon or made in pursuance of said reports, and the distribution and proportion of the liabilities and burdens and the claims therein found and reported; that said Central Trust Company of New York, complainant in all said bills in said Southern District of Ohio, Western Division, was also a party defendant in said bill brought by said Grenville D. Braman as hereinbefore stated, and was also joint or sole trustee under all of the mortgages made by each and all of the constituent companies or mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad, and brought bills to foreclose the first mortgage on every one of said divisions, and said trustees at all times had notice and

was present by counsel when all and singular the acts and doings in the premises occurred, whereby said claim of said Iron Railroad was created and the validity and undisputed character thereof and the proportions in which the same should be borne and paid by said other mortgage divisions were determined, all as hereinbefore stated;
28 and other and separate counsel for the bondholders of all the mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad respectively, have had notice of and attended, as they saw fit to, the determination of said claims as aforesaid and the hearing before said Master, J. D. Cox, in relation thereto.

And your petitioner, the purchaser of said road, purchased the same as trustee for the first mortgage bondholders, also petitioners herein, both of whom claimed that in their conduct in all and singular the proceedings herein mentioned and in making said purchase and consummating the same, as aforesaid, they of right relied upon the records, reports and proceedings of and in said courts prior to that time as hereinbefore set forth, alike in the determination of the several and separate rights and interests of said Iron Railroad and the vesting of said claim in them as bondholders purchasing the same, as provided in the decrees hereinbefore mentioned in that behalf, as well as in all other matters in the premises; and submit that said proceedings and their said rights and interest so vested, acquired and fixed, were at the time of said hearing in said City of Cleveland unreserved and indefeasible, and is supported by the deed in said purchase to said John C. Coombs. (Exhibit "O" 2.)

Twenty-sixth: That afterwards, to-wit: On or about the 8th day of August, A.D. 1884, an application was made in this case to establish a certain lien upon said mortgaged premises on behalf of certain contractors by the name of Newman and Spanner, and that said matter came on for hearing before his Hon. Judge Baxter, judge of said court, who, still in pursuance of the rights and interests of said Iron Railroad in and to its said claim as theretofore determined as aforesaid, though establishing and allowing said lien, nevertheless provided that the same should be paid out of the fund due the Iron Railroad, when the same should be paid from the other divisions of said Toledo, Cincinnati and St. Louis Railroad, as hereinbefore mentioned and set forth; which finding and decree of Judge Baxter was entered of record on February 3rd, 1886. (Exhibit "J" 2.)

Twenty-seventh: That afterwards, to-wit: On the seventh day of January, A.D. 1887, the said Special Master Cox filed his third and final report in said Circuit Court of the United States for the Southern District of Ohio, Western Division, and at or about the same time in the Circuit Court of the United States for the District of Indiana; which said report brought down the amount of said claim of the Iron Railroad to Nov. 1, 1884, or so as to cover the entire period of said receiverships; but always upon the same basis, considerations,
29 proportions and tables theretofore adopted by said master in his

said first and second reports and approved by the court, as aforesaid, in which said first and second reports said claims as brought down to the first day of April, 1884, said master had found amounted at that date to $33,716.37 as above shown, and said third and final report, bringing said account down to November 1st as aforesaid, containing among other things the following:

"The gross earnings and expenses of the Iron Railroad Division down to Nov. 1, 1884, as shown by the receiver's books, are as follows:

	EARNINGS.	EXPENSES.
Dwight's receivership	$24,681.45	$7,113.53
Craig's receivership, Nov. 1, '83, to July 19th, 1884, the time the road was delivered to purchasers	47,179.12	23,632.26
Net earnings Dwight's receivership . .		17,576.92
Net earnings Craig's " . .		23,546.76
Total net		$41,114.68

"To this must be added the sum of $633.41 mentioned above."

"As to the eighth proposition submitted by the said counsel, the master finds as matter of fact that the whole earnings of the system and all parts of it, including the Iron Railroad Division, were used by the receivers to pay current expenses of operating the whole system, keeping the accounts of the several divisions separate under the order of the court, as before stated.

"The master finds as matter of law that, under the interlocutory decrees entered in these cases, the excess of earnings over expenses in the case of the Iron Railroad Division so used by the receivers for operating the other divisions of the road and system, ought to be a first charge against the fund arising from the sale of such other divisions, and to be paid out of such funds into the hands of the receiver or into the registry of the court, to be applied to the payment *pro tanto* of the senior lien upon the Iron Railroad next after the receiver's debt upon such Iron Railroad Division, if any there be."

Said final report was filed in said cases in the Southern District of Ohio, Western Division, on January 7th; in the Northern District of Ohio, Western Division, on January 18th; and in the
30 District of Indiana, January 12th, 1887; and were identical as filed in all said courts and cases, to which report as so filed, including the same as filed in said Iron Railroad case, these petitioners refer, making the same a part thereof. (Exhibit "Q" 2, "G" 2, "H" 2.)

Twenty-eighth: That afterwards, to-wit: On the 19th day of Feb., A.D. 1887, in said Circuit Court of the United States for the Southern District of Ohio, Western Division, this case and said

other cases pending in said court, as aforesaid, came on to be heard; and thereupon the following entry was made therein by said court:

"This cause coming on to be heard upon the final report of Jacob D. Cox, Special Master herein, and the exceptions thereto, and the arguments of counsel, and the court being fully advised, it is considered by the court that the exceptions to so much of the master's report as finds the sum of forty-one thousand, seven hundred and forty-eight and 29-100 dollars ($41,748.29), due to the Iron Railroad from the other divisions of the Toledo, Cincinnati and St. Louis system, be and the same are hereby overruled, and that the master's findings of said sum due be and it hereby is confirmed.

"And it is further ordered that the Iron Railroad be not required to pay any indebtedness or charge against it in said cause, except out of said fund and upon an accounting with it therefor." (Exhibit "R" 2.)

Twenty-ninth: That no exception was taken to said third and final report of said Jacob D. Cox, as aforesaid, by or in behalf of any party in interest in any court in which the same was filed, except that certain exceptions were taken thereto by your petitioners herein and certain other exceptions in the name of said Central Trust Company, but in behalf and also in the name of the purchasers of said Cincinnati Division and said Dayton Division and said Dayton and Southeastern Division, or by all or some of them, all of said excepting parties, however, except your petitioners herein, being represented by C. W. Fairbanks, attorney; who did file exceptions in said Southern District of Indiana, in behalf of the purchasers hereinbefore named in this article and who alone of the purchasers of any division of said railroad he then represented (Exhibits "S" 2, "T" 2); and that no other person or parties and no other mortgage division of said Toledo, Cincinnati and St. Louis Railroad or person or party interested therein, filed any exceptions in any court to said report; and that said entry was made in said Circuit Court of the United States for the Southern District of Ohio, Western Division, after hearing arguments upon said exceptions, and that no appeal from, exceptions to, or motion or petition to vacate or rehear, or bill to review, said decree overruling said exceptions and establishing said claim was ever taken, asked, made, filed, claimed or allowed. (Exhibit "U" 2.) And such overruling of said exceptions in said Southern District of Ohio was acquiesced in by said excepting parties as overruling said exceptions everywhere, and said excepting parties have settled their liabilities to your petitioners on account of said claim.

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Thirtieth. That there are other facts and records in addition to those hereinbefore set forth, which in the courts and as between the parties tend to establish and maintain the several separate interests of said mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad Company, and the claim of your petitioners to be reim-

bursed on account of said net earnings of said Iron Railroad diverted for the benefit of other mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad as hereinbefore set forth; to all of which and to the testimony taken by said Master Jacob D. Cox, now on file in the Circuit Court of the United States for the Southern District of Ohio, Western Division, your petitioners crave leave to refer at any hearing that may be had upon this petition. (Exhibit Cox's Evidence.)

Thirty-first: Your petitioners further say that, though they are advised and believe that in the foreclosure under the common trusteeship of the Central Trust Company, petitions for the adjustment of the claims of the divisions as between each other were unnecessary and the finding of the amount or amounts due from one estate to the other were included in the reference to J. D. Cox as master, without petition, yet your petitioners say that at one time their counsel being in Indianapolis asked the judge of said Seventh Circuit as to whether the protection of the rights of your petitioners in the premises required any petition, and the court suggested that while it might not be necessary it might still be advisable, for the purpose of notice, that a petition should be on file in that Circuit. Whereupon, on Feb. 8th, 1886, after the preliminary and supplemental preliminary reports of Gov. Cox had been filed as hereinbefore set forth, your petitioners, in pursuance and protection of the benefit thereof, did file a petition, wherein they set up, by way of introduction or inducement, that between August 1st, 1883, and about August 1st, 1884, while the whole road, including the Iron Railroad Divi-
32 sion, had been in the hands of Dwight and Craig, Receivers, net earnings of the Iron Railroad, to the amount of $41,133.91, were diverted by said receivers, and applied by them to the use of the other divisions, including those embraced in said causes pending in the District of Indiana, and that the exact amount of the divisions of said net earnings, and the distribution of the liability to repay the same over the other divisions of said T., C. & St. L. R. R., was within the reference to J. D. Cox, Master, and that it appeared by the ratio of distribution adopted by said master for apportioning the general expenses of said T., C. & St. L. R. R. to the several divisions thereof in the hands of the receivers that the division embraced in cause No. 7,766 should bear 30.05 per cent of the whole, and that the division embraced in cause No. 7,814 should bear 29.85 per cent of the whole. And said petition continued and concluded as follows:

"Wherefore, according to the sums and ratios aforesaid, there are due from said divisions respectively to said Iron Railroad, and should be paid into the Circuit Court of the United States for the Southern District of Ohio, Western Division, to the credit of the Iron Railroad in the pending cause No. 3,579, in equity in the docket of said

court (wherein said Craig was the receiver of said Iron Railroad as aforesaid), from said cause No. 7,706 in this court the sum of $12,360.73, and from said cause No. 7,814 in this court the sum of $12,278.46.

"And your petitioner prays that, without prejudice to any other rights or remedies he may have in the premises, an order may be entered in each of the above entitled causes, and a decree herein directing the payment as aforesaid of said sums so due to the Iron Railroad as aforesaid from said divisions embraced in the above entitled causes respectively out of the proceeds of the sales of said divisions heretofore made pursuant to the decree of this court therefor." (Exhibit "V" 2.)

And your petitioners say that they are advised and believe that said petition has never been passed upon, the denial of your petitioner's claim as a whole in the Iron Railroad case, as a matter of law, and the entry of that decree in the other causes pending in the Sixth and Seventh Circuits, as a matter of evidence, rendering it unnecessary to pass thereon unless or until the decree disallowing the claim as a whole and in the Iron Railroad case should be set aside, and the claim as a whole and as a claim of the bondholders and purchasers of the Iron Railroad against its receiver should be re-established there.

33 Thirty-second: Said hearing at Cleveland purported, among other things, to be in furtherance and pursuance of a former joint decree, rendered October 1st, 1886, by a court composed of Circuit Judges Gresham and Jackson and District Judges Woods and Sage, sitting at Cincinnati, Ohio, on said date; in which decree it was among other things ordered, adjudged and decreed that all and singular the indebtedness incurred by E. E. Dwight, Receiver of the Toledo, Cincinnati & St. Louis R. R. Co., and of the various divisions thereof in several actions brought in this Circuit and in the Seventh Circuit, shall be recognized as the debts of the court the same as the indebtedness of William J. Craig, receiver of said railroad and all its divisions.

And "that all the above indebtedness of said receivers from the 1st day of August, 1883, up to about August 1st, 1884, shall be apportioned among the several divisions as follows." And then follows a percentage of distribution; which percentage, however, it is decreed is not to be final between said divisions.

Your petitioners show that prior thereto and until the death of Judge Baxter and the appointment of Judge Jackson as Judge of said Sixth Circuit, said Circuit Court of the United States for the Southern District of Ohio, Western Division, had not expressly declared that Dwight's indebtedness should be paid as debts of that court and constitute a charge upon the mortgagees' interests in the divisions within the jurisdiction of that court. That, according to Cox's preliminary and supplemental preliminary report then on file,

the indebtedness of both said receivers to said Iron Railroad down to April 1st, 1884, to which time only it had been ascertained, was $33,716.37; and that this sum as undisputed indebtedness of said receivers had been so reported. That Dwight's total indebtedness was $26,583.21. And your petitioners show, by Cox's third and final report, that $17,567.92 of this was his indebtedness to the Iron Railroad Division. And that the indebtedness of said Craig to said division, during the time of his receivership thereof, was $24,-178.97, as appears by said final report of Cox. And your petitioners show that said joint decree of Oct. 1st, 1886, aforesaid, was entered in the Circuit Court of the United States for the Southern District of Ohio, Western Division, on said 1st day of October, 1886 (Exhibit "W" 2), and in the District of Indiana, on the 2nd day of October, 1886 (Exhibit "X" 2). And said decree stood without exception, appeal or petition for rehearing.

Thirty-third: That said decree of Oct. 1st, 1886, also appointed A. J. Ricks and William P. Fishback, Masters, to take evidence
34 of and report all of the indebtedness aforesaid; and that the purchasers pay in the same, within thirty days after confirmation. Which report was made and filed by said masters in said court in the Southern District of Ohio, on the 11th day of March, 1887 (Exhibit "Y" 2), and in said Northern District of Ohio, on the 11th day of March, 1887, and in said District of Indiana, on the 10th day of March, 1887. Wherein among other things said masters again approved claim as reported by Gov. Cox, and subject only to such objection, if any, as might be urged by way of legal exception thereto. And no exceptions to said report in favor said claim by said Fishback and Ricks were ever taken or filed anywhere. A copy of said report as filed in the District of Indiana is herein referred to and made a part hereof. (Exhibit "Z" 2.)

Thirty-fourth: Your petitioners on the 28th day of said April, in the Iron Railroad case, in the Southern District of Ohio filed a petition for a rehearing of said Cleveland decree. (Exhibit "A" 3.)

Thirty-fifth: Your petitioners at that time assumed and relied upon their belief that such petition, if timely granted there, would vacate said decree everywhere; and that it was for that reason as effectual as, while under the peculiar circumstances of the case hereinbefore set forth it would be more desirable than, the appeal to the Supreme Court of the United States which said decree allowed and which was to be perfected in and from said court for the Southern District of Ohio alone.

In support of their right to rely thereon, your petitioners show that said decree purported to be valid as and when pronounced, alike as to the matters therein decided and in respect of exceptions, appeals and rehearings, and as such, only, had the consent and agreement of the parties on which it rested: that so much of said decree as purported to disallow said Iron Railroad claim as therein passed

upon was properly a part only of said decree when entered in said court for the Southern District of Ohio as and for a decree of that court, or at least that said Cleveland decree showed upon its face that so much of it as purported to disallow said Iron Railroad claim as aforesaid was not, nor was it authorized, to be entered as an absolute and final decree in any of said courts except that for the Southern District of Ohio, but as one dependent and conditional for its permanency and finality upon the same remaining unreserved by appeal or otherwise in the Iron Railroad case in said court for the Southern District of Ohio; that said decree was dependent upon the continued concurrence of the judges pronouncing the same, especially in matters of purely local cognizance in and over which any one of the said judges, so wishing or in duty bound to withdraw his concurrence, might have complete and exclusive jurisdiction; that said Iron Railroad claim as passed upon in said decree was a matter of purely local cognizance and was so treated, as was also the discharge of the receiver as against the objection of the Iron Railroad Division, your petitioners then and there excepting to said disallowance and discharge by leave of court granted, and praying an appeal to the Supreme Court of the United States, which was granted upon the condition of their giving bond to the sole approval of the court for the Southern District of Ohio having jurisdiction of said Iron Railroad case, which bond they gave. (Exhibit "B" 3.)

Upon all of which and other like facts in respect of said decree therein appearing, your petitioners relied, and at that time filed no other petition than that in said Iron Railroad case in said last named court, and asked for rehearing of said Cleveland decree as such; and in pursuance of such understanding as aforesaid, addressed a letter to Judge Jackson, announcing their application for rehearing, briefly expressive of their understanding in part as aforesaid. (Exhibit "C" 3.)

Thirty-sixth: Nevertheless your petitioners were not unmindful that the implied agreement of the parties which by acquiescence had given said judges at Cleveland jurisdiction, or a voice in the decision of said claim as therein passed upon, should extend to a willingness and endeavor to have the same judges participate in a hearing upon their said petition, especially as they preferred, on the peculiar facts and circumstances hereinbefore set forth, to try first for a reversal of said Cleveland decree on said petition for rehearing rather than on said appeal to the Supreme Court of the United States. Accordingly they addressed a letter also to Judge Gresham, inviting his presence and enclosing a copy of said letter theretofore sent to Judge Jackson. (Exhibit "D" 3.)

Thirty-seventh: Your petitioners, in answer to their letter to Judge Gresham, received at a hearing on said petition in Cincinnati a letter from him stating his inability to be present, and that if Justice Matthews and Judge Jackson granted a rehearing upon the

application and entered such decree as your petitioners desired, he (Judge Gresham) presumed he would conform to their action. Liberty was given to show the letter to the court, which was done. (Exhibit "E" 3.) Your petitioners show that said letter was of a date subsequent to the end of the term current in the District of Indiana at the time of said Cleveland decree, and was expres-
36 sive of the willingness and consent of said Judge of the Seventh Circuit that said claim might be reheard and said decree reversed, if erroneous, on said petition for rehearing and by Mr. Justice Matthews and Judge Jackson of the Sixth Circuit, and impliedly assented to reversal in that manner instead of on the appeal to the Supreme Court of the United States contemplated in said Cleveland decree, if your petitioners and said Judges of the Sixth Circuit so preferred, and that if he did not insist upon the reversal of said decree by appeal only; and your petitioners relied upon said letter as evidence that the Judge of the Seventh Circuit recognized and in courtesy conceded the competency and liberty of the said Judges of the Sixth Circuit, in his absence, to withdraw from and break the concurrence upon which said Cleveland decree depended, so far as the disallowance of said claim as a whole and in said Iron Railroad case was concerned, and as evidence that said judge, though clearly reserving the independence and jurisdiction of his own court in his own circuit, would, upon the granting of a rehearing in the Sixth Circuit and the re-establishment of the claim there, presumably act in conformity with said court in the subsequent disposition of said claim.

Thirty-eighth: At the same time and afterwards your petitioners, further reflecting that an allowance of their claim should in justice necessitate some revision of the percentages of burdens as apportioned to other divisions in Cleveland, were further for that reason also desirous of the presence of Judge Gresham, and they still further recognized, as shown in the letter of Judge Gresham, that though said Cleveland decree should be vacated as to said Iron Railroad claim in its own case, said claim would not be distributed and enforced over and against the other divisions without some record evidence that the disallowance thereof as a whole had been reversed. Wherefore on June 4th, following, your petitioners filed said petition also in the Northern District of Ohio, Western Division, and in the Southern District of Illinois. (Exhibits "F" 3, "G" 3.)

Thirty-ninth: Your petitioners did not then file their said petition in the District of Indiana, for the reason, according to their present recollection, that they then learned that the term current in that District at the time of the Cleveland decree had passed; and your petitioners, recognizing that said Cleveland decree was substantially final in said Iron Railroad's own case as a matter of law, and until reversed there would be so everywhere as a matter of evidence, did not believe that it was competent or of any use for them to file a

petition for rehearing thereof in any court whose term had
37 passed, so long as said decree remained substantially final as aforesaid and until reversed in their own case. Your petitioners, however, relied upon the premises and facts herein stated and the fact that they had seasonably filed such petition in the Northern District of Ohio and the Southern District of Illinois, two courts having jurisdiction of said Toledo and St. Louis Divisions, without deeming such filing in the District of Indiana essential to the protection of their rights.

And your petitioners show that afterwards, to-wit, on or about the 23rd of the same month, Sylvester H. Kneeland, bondholder and purchaser of said Toledo and St. Louis Divisions of said T., C. & St. L. R. R., also filed a certain petition for rehearing of certain decrees in said foreclosure suit in the Southern District of Illinois, in which petition he refers to said Cleveland decree as follows: "Petitioner would further show that by the decree rendered and entered on the 16th day of April, 1887, known as the decree passed by the joint meeting of the Circuit Judges of the Sixth and Seventh Circuits, at Cleveland, Ohio, your petitioner was required to pay $51\frac{1}{2}$ per cent of all unpaid pay roll, accrued prior to the receivership and remaining unpaid." And in said petition was this prayer: "Petitioner further prays that this, his petition, for rehearing of said decrees, and for setting aside thereof, may be attended to and heard in connection with the petition for rehearing now pending in the Circuit Court of the United States for the Southern District of Illinois, touching other claims against said railway and property." (Exhibit "H" 3.)

And your petitioners show on information and belief that such petition for rehearing thus referred to in said petition for rehearing by Sylvester H. Kneeland must have been said Iron Railroad petition for rehearing previously filed on the 4th day of the same month, since there was no other petition for rehearing then pending in said Circuit Court of the United States for the Southern District of Illinois touching claims against said railroad and property. (Exhibit "I.")

Fortieth: Said petition for rehearing in the Southern District of Ohio came on for rehearing at Cincinnati on or about June 6th, 1887, before Mr. Justice Matthews and Judge Jackson; and said opposing divisions, though not at that time having filed any exceptions to said Iron Railroad claim in any court, were present by counsel and heard in argument wherein they especially urged as against said claim as a whole an improbability that said Iron Railroad Division had made the net earnings reported by the Master.

They also asked and claimed to reserve a right to be heard by
38 Judge Gresham before any action by said court then addressed should attempt to affect the divisions represented by such counsel.

Whereby your petitioners assumed that said counsel understood, as did your petitioners, that said decree as final in said Iron Railroad case would, if there maintained, be conclusive against your petitioners, but if there reversed would leave the matter of the consequent effect thereof and subsequent distribution and enforcement over and against the other divisions open to further consideration and hearing in the courts of the Seventh Circuit.

Forty-first: Said petition for rehearing was granted by a decree entered August 1, 1887, wherein the court recite that said petition is "in part to set aside (the decree) and for a rehearing of the claim of the Iron Railroad for net earnings in the sum of $41,748.39, earned while in the hands of the receivers. And the court being fully advised, it is considered by the court that said decree be and it is hereby set aside, vacated and annulled in so far as the same disallows said claim for $41,748.39. And it is ordered that the matter of said claim stand for rehearing and such further order and decree as may hereafter be made in respect to the same, and that this decree be entered in all said causes pending in the Sixth Circuit." (Exhibit "J" 3.)

Forty-second: Accompanying the entry of said decree, and filed with the same, was a letter from Judge Jackson giving notice of the decision to the Clerk of the Court, in which Judge Jackson recognizes the Cleveland decree as the one sought to be reversed, and that, too, in respect of said claim as a whole. (Exhibit "K" 3.)

Forty-third: Also accompanying said decree, and subsequently filed in said case, was a letter from Mr. Justice Matthews to Judge Jackson, in which he recognizes said Cleveland decree and treats the same as having disallowed said Iron Railroad claim as a whole and in said Iron Railroad and as between that division and its receiver. (Exhibit "L" 3.)

Forty-fourth: Said petition for rehearing having been granted, your petitioners pressed for the re-establishment of said claim and to that end procured the fixing October 20th, following, for a hearing thereon by Judge Jackson; but said opposing divisions having
notified your petitioners that they wished to have Judge Gres-
39 ham take part in said hearing, and your petitioners for the reasons herein stated also being desirous of such concurrent hearing, a correspondence by telegraph and letter was had between said parties and judges, a part of which is in your petitioners' possession and submitted herewith. The result of which correspondence was first a temporary postponement, because of the sickness of Judge Jackson, and afterwards notice from Judge Gresham that he should not be able to take part in such hearing during the coming winter at all. (Exhibits "M" 3, "N" 3, "O" 3, "P" 3, "Q" 3, "R" 3, "S" 3, "T" 3, "U" 3.)

Forty-fifth: Said claim came on further to be heard, in pursuance of said hearing theretofore granted in said Southern District of Ohio,

on or about Nov. 12, 1888; and a decree was then entered in said cases in the Southern District of Ohio, expressly recognizing said Cleveland decree and reciting that the same, in disallowing said claim of said Iron Railroad, being for $41,748.39, in the eighth paragraph thereof, had been made inadvertently, and continues: "Wherefore it is considered by the court that so much of said decree be annulled, set aside and held for naught, which is accordingly done, and said claim of said Iron Railroad for net earnings is hereby re-established in all respects as fully as if said decree of April, 1887, had never been made. Provided, however, that this decree does not warrant any enforcement or collection of said claim save in said cases No. 3,554, 3,576, 3,577, 3,578 and 3,579, without the concurrence herein of the Circuit Court of the United States for the District of Indiana and the District of Illinois."

Said decree further reserved the right of the court to impose upon said Iron Railroad the payment of a percentage of the distributable burdens of said receivership according to tables applicable thereto in the reports of J. D. Cox, Master. It also required said Iron Railroad first to pay Receiver Craig $1,500 compensation out of any moneys collected under said decree. (Exhibit "V" 3.)

Forty-sixth: According to the best recollection of your petitioners, the junior counsel of said opposing divisions was present at said hearing but did not seek to be heard, and said nothing further than to ask that nothing be done by said court to affect the divisions represented by him.

Forty-seventh: At said hearing the senior counsel for the opposing divisions, having had notice, telegraphed to Judge Jackson holding said court, concerning said claim, as follows:

40 "As to the claim of the Iron Railroad that was passed upon by yourself and Judge Gresham, all I want is that any question affecting the line of road from Toledo to St. Louis shall be passed upon by you and Judge Gresham as originally agreed. If the questions presented do not affect the parties I represent, I have nothing to say, but if any order is to be made affecting in any way the property or liability of my clients, then I not only wish to be heard, but I wish to be heard before yourself and Judge Gresham. My clients have complied with all the orders made by you and Judge Gresham at Cleveland in every particular. R. G. Ingersoll." (Exhibit "W" 3.)

Your petitioners relied upon this as evidence that said counsel understood as did your petitioners that the court at Cleveland was a court with jurisdiction, and that its orders and decrees made there were effective, but that this rested in the implied agreement of all parties in interest, and that such agreement should extend to according a rehearing of any matter there passed upon by the same Circuit judges. Your petitioners have no knowledge of any other agreement to which said telegram could have referred.

Forty-eighth: Your petitioners, in view of said telegram and

their inability by process or notice to comply with the conditions it asked of securing a hearing before both of said judges together, or of again procuring the attendance of said opposing divisions before Judge Jackson alone, deemed it expedient to have the fact that said divisions had already been heard in rehearing before Judge Jackson, on June 6th, 1887, appear of record, and so procured a recitation of the truth in that behalf, to be entered in said decree of Nov. 12th, 1888, wherein it is said "at the hearing of which petition (for rehearing), all the divisions of said T., C. & St. L. R. R. were present, being represented by counsel, who were heard in argument." (Exhibit "V" 3.)

Forty-ninth: That afterwards, to-wit: Nov. 18, 1888, the petitioners presented said decree to Judge Jackson, then at Cleveland, for his sanction to the entry thereof in said Circuit Court at Toledo, and were met by counsel for said opposing divisions, who had been notified of such application; and said counsel opposed such entry, and submitted an order made by the late Judge Baxter of said Sixth Circuit in said cases at Toledo, Dec. 20th, 1883, wherein the court there had purported to surrender primary jurisdiction over said Toledo Division to the Circuit Court of the Seventh Circuit. (Exhibit "X" 3.) And thereupon said Judge Jackson would not then order said decree to be entered in said Circuit Court at Toledo.

41 Fiftieth: Afterwards, on or about the 8th day of Nov., 1889, the parties met pursuant to notice by your petitioners before the Circuit Court for the District of Indiana at Indianapolis, when your petitioners recalled what had escaped their recollection in making said appointment that they had not theretofore filed their petition in that district; and your petitioners suggested to said court and parties that they had a copy thereof present, which with formal alteration they could then file there, or asked that said court hear them there on the petitions which had been filed in the Northern District of Ohio at Toledo, and in the Southern District of Illinois at Springfield; and thereupon it was suggested and, as your petitioners understood, was agreed without the slightest objection by anybody that the copy of the petition which your petitioners had with them should, with suitable formal alterations, be then filed at Indianapolis, and that the opposing divisions should enter their appearance; all of which, said petition being framed for rehearing of said Cleveland decree, was done; and said opposing divisions beginning to speak to the question of said petition were interrupted by the court with the remark, in substance, that in view of the action taken by Mr. Justice Matthews and Judge Jackson in the Sixth Circuit, said court could not refuse to grant a rehearing; and all parties agreeing in open court, a time was fixed when said rehearing should be had, which action appears in the appearances, entries and orders then made. (Exhibits "Y" 3, "Z" 3.)

Fifty-first: Afterwards said petition came on for hearing at Chi-

cago, on Feb. 24, 1890; and said opposing divisions then produced an affidavit made by one Neil McKennon in which was set forth he purported to have discovered errors in the books of the receivers by which, when corrected, it would be made to appear that said Toledo Division had itself made net earnings while in the hands of receivers, and consequently should equitably have a claim of its own against the other divisions, which should equitably afford it relief against said claim of said Iron Railroad. Said affidavit purported to have been made on the 22d of said February, two days prior to said hearing, and related to the books of said receiver kept during the period of August, 1883, to about the same date in the year 1884, while said Iron Railroad was in the hands of receivers. Your petitioners cannot state said affidavit with greater accuracy because the same was never filed in said case, and was only exhibited and submitted to your petitioners temporarily to aid in the examination of witnesses at the hearing on the reference there made. The fact of the call for said affidavit appears in evidence reported by Fishback, Master, in the reference there made.

42 Fifty-second: In pursuance of the purpose of said affidavit said opposing divisions procured a reference to be made to William P. Fishback, Master, to inquire into the truth thereof, as appears by the order then entered. (Exhibit "A" 4.)

Fifty-third: Said master having heard said parties and the inquiry by him having extended into the merits of said Iron Railroad's claim on questions and evidence submitted by both parties, he finds not only against the truth in substance of said McKennon affidavit aforesaid, but also in support of the justice of said claim, in reporting: "The evidence does not show that the apportionment of earnings and expenses, as made by Gov. Cox in his report, was too favorable to the Iron Railroad Company." (Exhibit "B" 4.)

Fifty-fourth: Your petitioners deem it pertinent to notice, as against any claim that your petitioners were too late in filing their petition, that your petitioners at the time of said hearing sought to protest against re-opening said case on the questions of said affidavit and cited the record that should bar such inquiry, but were checked by the court with the remark that your petitioners were before a court of equity and that a record bar did not commend itself; whereupon your petitioners apologized and only for the reason stated waived objection on that ground. And your petitioners say the defence then set up, based upon said affidavit, was in the nature of newly discovered evidence, brought to the attention of any court for the first time on said Feb. 24th, 1890, and of which the opposing divisions would obviously have been deprived had said petition been early filed and disposed of, and that said divisions thereby claimed and received a benefit from the delay.

At said hearing, said opposing divisions also read a certain other paper purporting to be an answer to said petition and a paper pur-

porting to be a statement of their positions, both of which papers according to your petitioners' best recollection were or purported to be on the merits. Your petitioners found among their own papers said papers stating the position of said opposing divisions after said hearing. (Exhibit "C" 4.)

Your petitioners have no recollection whatever that said alleged answer as read set up any objection to the jurisdiction of said court to entertain said petition because of the time of the filing thereof; and said opposing divisions took both said affidavit and said alleged answer away with them and never filed the same or either of them anywhere; and your petitioners, being desirous of knowing all and whatever defence were taken to their said petition, endeavored
43 to obtain copies and be informed of said answer, and applied to said opposing divisions, and before said Master Fishback, therefor, and wrote to the clerk of the court therefor or for a copy thereof and were answered that no such papers had been filed. (Exhibits "D" 4, "E" 4.)

Fifty-fifth: Said opposing divisions filed exceptions to said master's report in or about the month of March, 1891. (Exhibit "F" 4.) And said cause came on for hearing thereon and for further hearing at Chicago on Oct. 27th, 1891.

Fifty-sixth: Your petitioners in addition to the other facts hereinbefore stated show that said Cleveland decree purported to allow said opposing divisions then to file exceptions to said Cox's third and final report, which report supported said Iron Railroad claim, and say that no such exceptions were filed in the Circuit Court for the District of Indiana until the next term thereof, and then not until the 28th day of June, and were then filed *nunc pro tunc* as of April 16th previous, without notice to or consent of your petitioners. (Exhibit "G" 4.) And no such exceptions have ever been filed in any other of said courts or cases. (Exhibits "H" 4, "I" 4, "J" 4.)

Fifty-seventh: Your petitioners say that, under the stress of a speedy preparation of said petition for said rehearing, they did not notice when, where or how said Cleveland decree was filed, but have since learned and show that the same purports to have been filed in the court for the Southern District of Ohio, on the 12th day of April, 1887, as a proceeding in the presence of Judge Sage, but in which nothing is done or ordered by said Judge. (Exhibit "J" 4.) That in the District of Indiana the same purports to be filed under a caption which simply gives the title of said court, the time and date of April 16, 1887, and says thence "Before Hon. Walter Q. Gresham and Hon. William A. Woods." It recites no proceedings had or done by said Judges, but continues with a copy of said Cleveland decree, omitting the names of cases in the caption except those pending in said court of Indiana. (Exhibit "K" 4.) Of such filing your petitioners had no notice whatever.

In the Northern District of Ohio, at Toledo, said Cleveland decree

is filed without other or further caption or pretence than as the same was made at Cleveland, except that as the Cleveland decree it purports to have been done before Judge Welker on June 6th and contains the approval of Judge Jackson to an addition granting an
44 appeal in behalf of the Brooks Locomotive Works. (Exhibit "I" 4.) And the same was not filed there until June 6th, which was the last day of the term and two days after the filing of said petition for a rehearing thereon. Said decree was never filed in said court in the Southern District of Illinois at all. (Exhibit "I" 4.)

Wherefore for all and singular the premises your petitioners are advised, and allege, and ask this Honorable Court to find, hold and rule, as follows:

(1) To rule,—

(a) That said court, composed as it was and sitting at Cleveland, and the decree there pronounced, were each of its own kind alone, and were not contemplated in or subject to the rules made for the conduct of business in said Circuit Courts generally.

(b) That said court had jurisdiction from notice to and the presence and agreement, expressed or implied, of all the parties in interest, and not otherwise.

(c) That said decree was and purported to be a decree joint and concurrent of the Judges of both Circuits then assembled, and not otherwise.

(d) That in respect of the matters therein finally disposed of said decree was and purported to be final, as then and there pronounced and not otherwise; and, as such, was and purported to be subject to exception and appeal as where and when pronounced, and not otherwise or elsewhere except as therein provided, and was therefore necessarily subject to rehearing in the court in which the same was made appealable, or before the court pronouncing the same at its discretion.

(e) That your petitioners at all times heretofore have been and are warranted by said court and decree in treating each of the character aforesaid for the purpose of rehearing.

(2) That said court at Cleveland was without terms or record; and said decree, therefore, was not subject to the limitation of Rule 88 in respect of rehearings.

(3) That said decree purported to authorize an entry thereof only, and did not authorize any record or promulgation thereof as final in the several courts of said Circuits.

45 (4) That the decree of said court, composed as it was and sitting at Cleveland, was and purported to be a single joint decree, and all entries of the same made as therein ordered were entries of one and the same joint decree, and did not constitute separate decrees of the several courts respectively wherein the same was ordered to be entered; and, as so entered, was liable to be vacated

upon any appeal, review or rehearing to which said decree as originally pronounced was subject.

(5) That the decree of said court, composed as it was and sitting at Cleveland, expressly authorized and warranted all said parties and judges in treating the same as single joint decree; and in treating all entries of the same, when made as therein ordered, as entries of one and the same joint decree, and not as separate decrees of the several courts, respectively, wherein the same should be entered, and was liable to be vacated upon any appeal, review or rehearing to which said original decree was subject.

(6) That it was not competent for the judges of the two Circuits to meet, as they did, at Cleveland aforesaid, and authorize the promulgation of their joint determination as decrees of the several courts in their respective circuits, without fixing or limiting the time or terms for the entries thereof in said courts so as to protect the rights of aggrieved parties under the rules of said court in respect of rehearing, appeals and reviews of said decree. And that said decree did not authorize such entry thereof in said courts, respectively, without other or further notice, so as to deprive your petitioners of effective rehearing thereof unless such rehearing should be granted at the current terms of said court, respectively, at which such entry might be made.

(7) That said Cleveland decree, in so far as the same purported to disallow said Iron Railroad claim, required for its validity the concurrence and freedom to concur of the judge of the Sixth Circuit who united in pronouncing it, and was dependent for its permanency and finality upon the concurrence and freedom to continue in concurrence of said judge, at least during the period in which your petitioners might, as of right, and for error of law apparent upon the record of the court of said judge of the Sixth Circuit, procure a rehearing thereof before said judge.

(8) That petition for rehearing having been filed in the Southern District of Ohio, Western Division, by one of the circuit judges
46 who united in pronouncing said decree and the other of said circuit judges having knowledge of the hearing on said petition and consenting thereto, said decree ceased to be final and was and became in effect interlocutory everywhere in respect of all matters reheard as aforesaid.

(9) That said Cleveland decree, if relevant and material to the disallowance of the Iron Railroad claim as entered in the District of Indiana, did not become final in that court with the lapse of the term then current, for want of the exceptions to said claim as reported by Gov. Cox which said decree allowed to be filed and purported to sustain.

(10) That filing such exceptions, or even permitting the same to be filed, in said court on the following term, June 28, *nunc pro tunc* as of April 16, in a prior term and without notice to your peti-

tioners, was an irregularity and did not sustain said decree as final with the lapse of the term in which said decree was entered as aforesaid.

(11) That filing such exceptions, or even permitting the same to be filed, June 28, as aforesaid, did not sustain said decree as final during the term in which exceptions were actually filed, nor in any subsequent term of said court until the said petition for rehearing (which at the time of the filing of said exceptions as aforesaid had been filed in all of the other courts in which said decree had been entered, and had been brought to the attention of and entertained by or with the knowledge and consent of all said judges, and heard in argument on behalf of all parties in interest and granted during the current term of said District of Indiana) should be disposed of.

(12) That until the exceptions which said decree allowed to be filed and purported to sustain were actually filed, said decree as entered in the District of Indiana was subject to rehearing as not final, and that your petitioners were entitled to notice of the filing of such exceptions at any subsequent term so as to protect their right to all necessary rehearing under Rule 88, by application therefor during any term in which such exceptions should be allowed to be filed.

(13) That the true construction of Rule 88 in equity does not require that a petition for rehearing, duly entered at the term in which the decree sought to be reheard is entered and recorded, shall be passed upon during the then current term, but may be passed upon at a subsequent term.

47 (14) That your petitioners will not be conclusively presumed to have known and to be held bound by such construction of Rule 88 in equity as required that a petition for rehearing duly filed during the term in which the decree sought to be reheard is entered and recorded cannot be granted after the term then current; and that your petitioners had a right to rely and be protected in relying upon the construction of said rule set forth in the last preceding (numbered 13) request.

(15) That the application of your petitioners for rehearing, brought to the attention of all parties in interest and the judges of both circuits and entertained by or with the knowledge or consent of all of them at a time when on the records of each of said courts as the same stood a rehearing could have been granted by said judges in all of said courts, prolongs the time in which the prevailing party is prevented from availing himself of such decree as final until such application is disposed of.

(16) That said Cleveland decree purported to disallow said Iron Railroad claim for $41,748.39, as a whole and as a claim against its receiver, and did not purport to ascertain, find or disallow distributable parts thereof as *pro rata* claims against the several mortgage divisions, either in behalf of said receiver or your petitioners; and

that the exceptions to and appeal from said decree by your petitioners as said decree was pronounced were matters of local cognizance in said Iron Railroad case in the Southern District of Ohio, Western Division, in which the controversy, as the same purported to be determined in said decree, was confined to your petitioners or their trustee, the Central Trust Company, and the receiver, and that as such, by the provision of said decree, said appeal was to be perfected in and from said Iron Railroad case in said Southern District of Ohio, and not elsewhere or otherwise; and that upon a successful maintenance of said appeal, said decree would by mandate from the Supreme Court of the United States have been directly vacated or reversed in that court alone; that the granting of said petition for rehearing in said Circuit Court of the United States for the Southern District of Ohio, Western Division, vacated by your petitioners' right of appeal, as well as all necessity therefor, in said court in respect thereof; and that the granting of such rehearing and the subsequent re-establishment by said court of said claim in all respects as fully as if said Cleveland decree had not been made, was as effective in vacating said Cleveland decree and in re-establishing said claim as the successful maintenance of the appeal from said Cleveland decree taken as therein contemplated would have been.

48 (17) That said decree of said court, sitting at Cleveland in the manner and form aforesaid, authorized and warranted your petitioners in treating said decree as of the character and effect set forth in the last preceding (numbered 16) request for ruling, and in relying for the rehabilitation of their rights upon rehearing of said claim in said court and case in the Southern District of Ohio, Western Division, and in relying upon their petitions as and when filed in said other courts in the Sixth and Seventh Circuits as sufficient for the re-establishment and enforcement of the distributable portion of said claim as against said other divisions, in so far as any petition therefor, or to overcome the effect of said Cleveland decree as evidence, may be necessary.

(18) That so much of said Cleveland decree as purports to disallow said Iron Railroad claim in the manner and form as the same was therein treated and disposed of, was, as entered in the court for the Northern District of Ohio, Western Division, and in the courts of the Seventh Circuit, surplusage except as evidence of the disallowance of said claim as a whole in the court for the Southern District of Ohio, having jurisdiction thereof, and that the decree re-establishing said claim in said last named courts and cases respectively, for the correction of so much of said decree as purports to be evidence of the disallowance of said claim.

(19) That the protection of the rights of your petitioners requires the court of the Seventh Circuit to hold that the court at Cleveland derived its just jurisdiction from the consent and agreement of the parties, which agreement extends to and includes a right to rehear-

ing before the same circuit judges concurrently or successively as and whenever the same could be procured; and that there is sufficient evidence on which your petitioners have been at liberty to rely, of such understanding and agreement on the part of both judges and parties to warrant the court in continuing to entertain jurisdiction of said petition as filed in the District of Indiana.

(20) That it was not competent for the judges of the Sixth Circuit to make, or for the judges of the Seventh Circuit to receive, the transfer of jurisdiction of the suit to foreclose the Toledo Division of said Toledo, Cincinnati and St. Louis Railroad in the State of Ohio from the Circuit Court in the Northern District of Ohio wherein the same was pending, or thereby for said judges or any of them to make said suit ancillary merely to the foreclosure suit in the District of Indiana.

49 (21) That it was not competent for said judges to make such transfer of jurisdiction as aforesaid,—

(*a*) With the effect of depriving said Circuit Court for the Northern District of Ohio of jurisdiction to entertain and enforce claims against the said Toledo Division and the property thereof in ~~the~~ State of Ohio.

(*b*) With the effect to require your petitioners to apply for and prosecute a rehearing of said Cleveland decree, as authorized to be entered in the Northern District of Ohio, and so far as the same purports there to disallow said Iron Railroad claim exclusively in the District of Indiana.

(*c*) Or with the effect to prevent the judges of the Sixth Circuit from granting a rehearing of and vacating said Cleveland decree as authorized to be entered in said Northern District of Ohio so far as the same purports there to disallow said Iron Railroad claim:

(*d*) Or with the effect to prevent the decree of the Judge of the Sixth Circuit re-establishing said claim from being entered in said court for the purpose of charging said Toledo Division and Toledo Terminals, or the property thereof, within the jurisdiction of said court with the payment of a just proportion of said Iron Railroad claim as re-established as aforesaid.

(22) That as the Circuit Court of the United States for the Southern District of Illinois was the first court in which there was any receivership of the mortgagee's interest in the St. Louis Division of said T., C. & St. L. R. R., and was the only court in which the judgment creditors' receivership was expressly extended over the mortgagee's interest in that division during the whole period in which the net earnings of the Iron Railroad were expended in behalf of the other mortgage divisions of said road, said Circuit Court for the Southern District of Illinois is and at all times has been a proper court in which to charge that interest in said division with the payment of its just percentage of said Iron Railroad claim aforesaid, as and whenever established.

(23) That as the courts of the Sixth Circuit, having jurisdiction of the greater part of said Toledo Division of the T., C. & St. L. R. R. Co., have granted rehearing of said Cleveland decree and re-established said claim, and as the court for the Southern Dis-
50 trict of Illinois, having jurisdiction of the greater part of the St. Louis Division, may do the same at any term at which said Cleveland decree may be entered therein, or may enforce said claim against said division without such entry, Rule 88 in equity is no longer effective, and therefore no longer applicable, as a rule of practice to prevent a rehearing of said decree as final, nor for any substantial purpose of preventing an enforcement of such *pro rata* part of said claim as pertains to each of said divisions against them respectively; for all which reasons, as well as for others set forth in said amended petition, said rule is not applicable as now for the first time or hereafter pleaded of record to prevent the court for the District of Indiana from continuing to entertain jurisdiction of said petition for rehearing as and when filed and allowed and as herein amended.

Your petitioners, in addition to the payment of all local charges against said Iron Railroad Division, offer to pay such *pro rata* part of all general and distributable burdens of said receiverships as should pertain to and have not been paid by or in behalf of said Iron Railroad Division.

Your petitioners pray.—

First: That the Honorable Judge of the Seventh Judicial Circuit who participated in pronouncing said Cleveland decree will concur with the Honorable Judge of the Sixth Judicial Circuit in his decree of August 1st, 1887, granting a rehearing of said Cleveland decree in so far as the same purported to disallow said Iron Railroad claim; and will also concur in the decree of said judge of said Sixth Circuit of Nov. 12, 1888, re-establishing said claim in all respects as fully as if said Cleveland decree had not been passed.

Second: That this Honorable Court will find, rule, order, adjudge and decree that your petitioners' said claim for $41,748.39, with interest thereon, constitutes a first charge against the funds arising from the sales of the other divisions of said T., C. & St. L. R. R. Co., to be paid out of such funds, and applied to the payment *pro tanto* of the senior lien upon the Iron Railroad next after the receiver's debt upon such Iron Railroad, if any there be.

Third: That the bondholders and purchasers of said St. Louis Division and said Toledo Division, including the Toledo Terminals of said T., C. & St. L. R. R., may jointly and respectively be
51 ordered, directed and decreed to pay into the registry of one or some of the courts having jurisdiction of the suits for the foreclosure of the mortgages on said divisions such *pro rata* part or proportion of said railroad claim and interest thereon as may be found to pertain to said divisions jointly and respectively, within such time

as may be limited therefor, and that in default of such payment said divisions may be ordered to be resold for the payment thereof.

Fourth: That this Honorable Court will concur in the enforcement, in the Northern District of Ohio, and against the Toledo Division of said T., C. & St. L. R. R., or the property thereof in said Sixth Circuit, of the decree of November 12, 1888, of the Judge of the Sixth Judicial Circuit re-establishing said Iron Railroad claim.

Or, in the alternative, if this Honorable Court declines any jurisdiction in or over said case or the property in the Sixth Judicial Circuit, then that this Honorable Court will address such letter of instruction or advice to the Judges of the Sixth Judicial Circuit, or such order for entry in the said Toledo Division foreclosure suit, numbered 382 in equity on the docket of the Circuit Court of the United States for the Northern District of Ohio, Western Division, in disavowal of any claim to jurisdiction in or over said case and said division in the State of Ohio, as may be necessary or pertinent to enable your petitioners to procure an entry in said case and court of the decree of the Judges of said Sixth Circuit of August, 1887, vacating said Cleveland decree so far as the same purported to disallow said Iron Railroad claim, and a like entry of said decree of said Judges of said Sixth Judicial Circuit of November 12, 1871, re-establishing said claim as full and in all respects as if said Cleveland decree had not been passed and a decree for the enforcement of that claim against said Toledo Division and the property thereof within the jurisdiction of said court for the Northern District of Ohio, all consistently with the maintenance of the reciprocal comity and courtesy existing between the judges of said circuits in respect of said litigation, but without detriment to the rights of your petitioners in the premises.

Fifth: That so much of said Cleveland decree as purports to disallow said Iron Railroad claim may be vacated, annulled and held for naught, and as no bar to the enforcement of a just proportion of said Iron Railroad claim against said St. Louis and Toledo Divisions, including said Toledo Terminals, so far as the causes in the District of Indiana are concerned.

52 Sixth: That orders and decrees for and consistent with the enforcement of payment and collection of such *pro rata* part or proportion of said claim by the bondholders and purchasers of said divisions respectively in said Circuit Courts of the United States for the Northern District of Ohio and the Southern District of Illinois and against and out of the mortgaged property of said divisions within the jurisdiction of said courts respectively alone or in conjunction with such of said property of either division as may also be within the jurisdiction of this court, may be made and entered herein.

Seventh: That your petitioners may have such other and further relief, and that the bondholders and purchasers of said St. Louis and Toledo Divisions, including said Toledo Terminals, may be held

to stand to and abide such other and further order, direction and decree as the nature and circumstances of said case and the rights of your petitioners in the premises may require and to your Honors shall seem meet.

Wherefore, because of all and singular the premises, your petitioners say that they have been aggrieved by the order, judgment and decrees of the said court of the United States sitting in said Northern District of Ohio, Eastern Division, in joint session disallowing said claim of said Iron Railroad, and pray that they may be heard in argument upon the question thereof.

JOHN C. COOMBS,
GUSTAVE W. WALD,
Counsel for Purchasers and first mortgage Bondholders of the Iron Railroad.

53 **"B."**

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

May Term 1883. August 2nd, A.D. 1883.

Before HON. THOMAS DRUMMOND, Circuit Judge.

In Chambers at CHICAGO, ILLINOIS.

Grenville D. Braman,
vs.
The Toledo, Cincinnati and St. Louis Railroad Company, The Central Trust Company of New York and Thomas A. Hendricks.

Now comes the complainant by his solicitor, John A. McMahon, Esq., and the defendant, the Toledo, Cincinnati and St. Louis Railroad Company by its solicitor, James A. Conolly, and the Central Trust Company of New York by its solicitors, Hoadly, Johnston and Colston; and the said defendants enter their appearance by their counsel as aforesaid; and the complainant files his bill of complaint herein, and moves for the appointment of a Receiver of all and singular the premises and property in the said bill described; upon consideration whereof it is now by the court, ordered, adjudged and decreed the said Toledo, Cincinnati and St. Louis Railroad Company assenting thereto, and the said Central Trust Company of New York, not objecting thereto, that Edward E. Dwight be appointed temporarily receiver herein, upon his giving bond with security to be approved by the court, or one of the judges thereof, in the penal sum of fifty thousand dollars ($50,000.00) conditioned for the faithful performance of his duties as such receiver, and for obeying all
54 the lawful orders of the court herein; and that as such receiver, he is hereby ordered and directed to take possession of, maintain and operate the said railroad and premises, described in the said bill of complaint, being the railroad of the Toledo, Cincinnati and St. Louis Railroad Company, extending, lying and being a railroad from the City of Toledo, in Lucas County, in the State of Ohio, through the Counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert to the Town of Delphos in said Van Wert County, all in the State of Ohio; and the Counties of Adams, Wells, Huntington, Grant, Howard, Clinton, Tippecanoe, Montgomery, Fountain, Vermilion and Parke, all in the State of Indiana; and through the Counties of Vermilion, Edgar, Douglass, Coles, Cumberland, Shelby, Fayette, Bond, Montgomery, Madison and St. Clair, all in the State of Illinois, to and into the City of East St. Louis in said St. Clair County; also from said Delphos in said Allen County in said State of Ohio, southwardly, through the Counties of Allen, Van Wert, Mercer, Darke,

Miami and Montgomery, all in the State of Ohio, to and into the City of Dayton in said Montgomery County, Ohio, and thence through the Counties of Montgomery, Greene, Fayette, Ross, Vinton and Jackson, all in the State of Ohio, to the town of Wellston, in said Jackson County; also from a point on the line of said railroad between Wellston and Coalton in Jackson County, Ohio, through the Counties of Gallia, Jackson and Lawrence, all in the State of Ohio, to a connection with the Ironton and Huntington Railroad, at or near Ironton, in said Lawrence County, Ohio; and also to the Ohio River in Upper Township, in said Lawrence County, Ohio; with a branch extending from the main line of said railroad, near Shakertown in Montgomery County, Ohio, through the Counties of Montgomery and Warren in the State of Ohio, to a point known as Dodds, in said Warren County, also with a branch extending from Mercer to Shanesville in Mercer County, Ohio; also from a point in the City of Cincinnati in Hamilton County, Ohio, northwardly through the Counties of Hamilton, Butler and Warren, all in said State of Ohio to the Village of Waynesville, in said Warren County; also from a point in the City of Cincinnati, in said Hamilton County, Ohio, south of Court Street and west of Broadway, in said city, through the Counties of Hamilton and Butler in the State of Ohio, to the town of Venice in said Butler County; its equipments, income and franchises, with all its appurtenances, as well as its lands and other premises, as fully described in said complaint, reference thereto for greater certainty is had and made; but this order is to apply only to so much of said premises as are within this district; the remainder of the said railroad being subject to the control and direction of the proper courts, within whose jurisdiction the said premises lie, should such courts see fit to take action
55 therein: and the said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity, to take charge of, care for and operate a railroad; to make report of his acts and doings at least every two months to the court; to collect and receive the tolls, incomes, issues, rents and profits of said premises, and out of the same to maintain and keep the property safe and in good repair, to pay the debts due for wages and materials and supplies, which have been incurred in the maintenance and operation of the said property during the six months last past. In his reports so ordered to be made, of his receipts and expenditures, acts and doings under this order, he shall report whether there are any funds in his hands accruing from said income, applicable to the payment of interest or principal of any of the indebtedness of the said railroad company or any of the constituent companies, out of which, by consolidation, it has been formed.

It is further ordered, that any party in interest shall have leave to apply to this court within ninety (90) days of the date of this

order, to move for a change of the receiver hereby appointed, and the substitution of another in his place, in the absence of which application the receiver hereby appointed shall continue, unless the court shall afterwards, of its own motion, or on the motion of some party in interest, aggrieved by the action of the receiver, appoint some other person or persons; and power and authority are hereby reserved to any party interested in any one of the constituent companies out of which the consolidated company was formed, to apply to the court for a direction to the receiver, to keep an account of the receipts and expenditures of such constituent company, so as to preserve and secure any special equities which the court may find to exist in favor of such constituent company and all other matters not included in this order are reserved for the future consideration of the court.

And the said Edward E. Dwight thereupon came, and filed his bond, which is approved by the Circuit Judge, and took the oath of office, and accepted the office of Receiver hereby conferred on him.

56 UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order entered in said court on the 2nd day of August, 1883, in the cause of *Grenville D. Braman* vs. *The Toledo, Cincinnati & St. Louis Railroad Company, et al.*, No. 7,672, as fully as the same appears of record in my office.

Witness my hand and the seal of said court at Indianapolis in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

THE UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of an order entered upon the chancery order book of said court in the case therein entitled; that I have compared the same with the original entry of said order, and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Toledo in said district, this 30th day of January, A.D. 1892, and in the 116th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*

By MOLLIE W. BROWN, *Deputy Clerk.*

57 **"C."**

CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF INDIANA.

Grenville D. Braman,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*

Petition of Charles R. Butt, *et als.*, bondholders of the Iron Railroad Company, in the application for a receiver in the above entitled cause.

To the Honorable Judges of the Court:

Charles R. Butt, of Boston, in the Commonwealth of Massachusetts, Thomas Dana, N. B. Mansfield, and others, bondholders of the Iron Railroad Company, mentioned in said bill, respectfully beg leave to appear in the said cause and represent:

1. That said Iron Railroad consists of a number of radiating or spur tracks, running to furnaces or other iron works, located in and about Ironton, Ohio, at the extreme end of the southeasterly branch of the defendant's line of railroads; that it is an old established road, constructed long before the rest of defendant's said roads, and was mainly designed to accommodate a local business in distributing supplies, and to facilitate transportation on the Ohio river; that it is operated almost exclusively for and in connection with the iron industry carried on in and about Ironton; that its gauge is different from that of all the rest of the defendant's road, and that it is fully equipped, as well with rolling stock fitted to its own gauge as otherwise, to carry on the peculiar traffic for which it is designed.

58 That it is not a necessary part of defendant's said system of roads, nor is a community of interests in any actual connection with it essential to the successful or convenient operation of said system; and if such actual connection be so essential or even desirable, than exists in behalf of said system of roads, a right of way and use of a narrow-gauge track (already laid as your petitioners are informed), conforming to the rest of defendant's said road, over the location of said Iron Railroad, and exempt from the operation of said trust or mortgage deeds upon the same, so that the legal severation of said Iron Railroad from defendant's system of roads by a foreclosure of the said mortgages, would in no wise impair the efficiency and facilities of said system as a common carrier. That the interests of said Iron Railroad are not necessarily coincident with the rest of said system of roads, but because of its situation, equipment, gauge, inability to participate in any through traffic, comparative freedom from mail and express service, and close alliance with and

dependence upon a single industry, its interests may be and are likely to be independent of or in conflict with the interests of said system.

That the qualifications of a receiver peculiar to its business might not readily be found in any one well qualified to act as a receiver for the rest of said system, operated as a general common carrier.

2. That the installments of interest due upon the first mortgage bonds of said Iron Railroad, January 1st and July 1st, 1883, were not paid, though your petitioners are informed and believe that its separate net earnings, if ascertained, were more than sufficient for that purpose; but that the same were mingled with the earnings of the rest of defendant's said roads and appropriated to the expense and improvement of the entire system thereof, the rest of said road, as your petitioners are informed and believe, not being fully equipped, and some of it being of but recent and imperfect construction; and your petitioners pray that under an unrestricted receivership over said Iron Railroad with the rest of said system, the interests of said roads, and of the bondholders thereof, might be sacrificed for the general benefit of all; especially in the absence of any possible authority on the part of such receivers to enter into any permanent contract, obligations to operate, compensate or indemnify it.

3. That by the terms of the deed of trust securing the same, the interest upon said income bonds is dependent upon, and to be paid out of the net earnings of said Iron Railroad Company, and
59 that upon default, by the express stipulation of said deed, the trustee therein named may have a receiver appointed, without resistance on the part of said company, to carry out the provisions of said deed for the payment of such interest. But your petitioners say that no interest has ever been paid upon said bonds, and your petitioners are informed and believe that by the consolidation of said Iron Railroad with the rest of said system, its own separate organization was abandoned, its income and expenses mingled with those items in the management of said entire system and that there is not, and by an unrestricted receivership over said Iron Railroad with the rest of said system there will not be any board or person charged with ascertaining the income and expenses of said road, neither will the means of ascertaining the same be preserved.

For all which reasons among others your petitioners pray that the order for the appointment of receivers, if granted in said cause, may be so framed that the same shall be without prejudice to the rights of foreclosure under the first or second or both of said trust or mortgage deeds of and upon said Iron Railroad, the property and franchises thereof; that said receivers be required to keep a separate account of the income and expenditures, of, for and on account of said Iron Iron Railroad, and that no expense be incurred or borne by said Iron Railroad, save for the operation of its own line, and out of its own income, and that no new liability for or against it be created under said receiverships without further order, upon notice, and

that right be reserved to the master to apply in behalf of said second mortgage or income bondholders for a receiver of said Iron Railroad, its property and franchises, as provided in said second mortgage or trust deed; but without prejudice, meantime, to the rights of the receivers to be now appointed, limited as aforesaid, or the right of such receivers to avail themselves of any equity of redemption to which they may be entitled as aforesaid.

CHARLES R. BUTT,
47 Rutland Square, Boston, Mass.

THOMAS DANA,
N. B. MANSFIELD, *et al.*
By their solicitor,
JOHN C. COOMBS.

JOHN C. COOMBS,
Solicitors for Petitioners.

60 UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the intervening petition of Charles R. Butt, filed in said court on the 1st day of August, 1883, in the cause of *Grenville D. Braman* vs. *The Toledo, Cincinnati, & St. Louis Railroad Company, et al.*, No. 7,672, as fully as the same remains on file in my office.

Witness my hand and the seal of said court at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

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61 **"D."**

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Be it remembered, that on a hearing before the Honorable Martin Welker, District Judge, sitting at Chambers on the seventeenth day of August, A.D. 1883, the following order was made and signed and ordered to be entered upon the records of the court, to-wit:

Grenville D. Braman,
vs.
Toledo, Cincinnati & St. Louis Railroad Company, *et al.*

And it is further ordered that said receiver shall keep, so far as it is practicable, a separate account of the indebtedness of the Cincinnati Northern Railway Company and the Iron Railroad Co., existing at the time of their consolidation, and all payments thereon made

since the consolidation up to the time of the appointment of the said receiver and of all payments made by said receiver since his said appointment herein, and also of all earnings of said Cincinnati Northern Railway and the said Iron Railroad during each of said respective periods. And it is also further ordered that the said receiver keep a separate account of the amount paid by him out of the said loan hereby authorized, for wages and labor upon said Cincinnati Northern Railway and said Iron Railroad during said month of June, and all special equities which the said Cincinnati Northern Railway Company and said Iron Railroad Company are hereby reserved.

62 THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of a portion of an order entered upon the chancery order book of said court in the case therein entitled; that I have compared the same with the original entry of said portion of an order and it is a true transcript therefrom.

Witness my official signature and the seal of said court, at Toledo in said district, this 28th day of January, A.D. 1892, and in the 116th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*
By MOLLIE W. BROWN, *Deputy Clerk.*

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63 **"H."**

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said district, on the first Tuesday in June, being the 4th day of said month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the 108th.

Present the Honorable John Baxter, Circuit Judge, Martin Welker, District Judge.

Among the proceedings then and there had were the following, to-wit:

SATURDAY, September 29th, 1883.

Grenville D. Braman, *Complainant*,
against
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 366.*

This cause came on to be heard upon the application of the Central Trust Company of New York, for leave to prosecute a suit in equity instituted by it against the defendant, the Toledo, Cincinnati and St. Louis Railroad Company and others to foreclose a mortgage upon the Cincinnati Northern Railway, lying in the Southern District of Ohio, and to set aside the order heretofore made in this cause appointing a receiver to take and hold possession of defendant's railroad.

64 And the court, being fully advised in the premises, now grants leave to said Central Trust Company to prosecute said suit in the Southern District of Ohio. And the court further orders that the order heretofore made in this cause, appointing a receiver for said property, be and the same is hereby ordered to stand until Oct. 20, 1883, and the said Receiver, E. E. Dwight, is hereby ordered to be discharged on said 20th day of October and to re-deliver on that day the possession of the Toledo, Cincinnati and St. Louis Railroad, so far as the same is situated within the State of Ohio, together with all the rolling stock, material, supplies, and all other property in his possession belonging to said company, unto the defendant, the Toledo, Cincinnati and St. Louis Railroad Company, such delivery to be made and completed on October 20th, 1883.

And said receiver shall pay any money in his possession into court and file his account at that date, and the order heretofore made requiring said receiver to file his account within sixty days from the date of said order, is modified so as to allow said account to be filed on October 20th as aforesaid.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of an order entered upon the journal of the proceedings of said court in the therein entitled cause; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Toledo, in said district, this 13th day of February, A.D. 1892, and in the 116th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk*.
By MOLLIE W. BROWN, *Deputy Clerk*.

65 **"J."**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, O., on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-three, and on the Independence of the United States of America, the one hundred and eighth.

Present, the Hon. George R. Sage, District Judge.

On Wednesday, the 25th day of October, A.D. 1883.

Among the proceedings had were the following, to-wit:

The Central Trust Company of New York,
vs.
The Iron Railroad Company, The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*

This cause coming on to be heard upon the bill of complaint of the said Central Trust Company of New York, upon its motion for the appointment of a receiver of all and singular the railroad and premises, property and assets, real and personal, in said bill of complaint described, of the said Iron Railroad Company; and the said Iron Railroad Company and the said Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company, appearing and thereto consenting by Henry D. Hyde, Esq., the attorney of said respective railroad companies, and the said Grenville D. Braman, appearing and consenting thereto by his attorney, John A. McMahon, Esq., upon consideration whereof it is now ordered, adjudged, and decreed by the Honorable John Baxter, Circuit Judge, that William J. Craig be and he hereby

66 is appointed receiver of all and singular the premises, property, money, and assets described in the said bill of complaint in this suit, upon his giving bond, with good security, to be approved by the Honorable John Baxter, Circuit Judge, or by the Honorable George R. Sage, sitting as Circuit Judge of said district, in the penal sum of two thousand dollars conditioned for the faithful performance of his duties as such receiver, and for obeying all lawful orders of the court herein; and that as such receiver he is hereby ordered to take possession of, maintain and operate the said railroad, premises and property described in said bill of complaint herein, being all and

singular the right of way and line of railroad of the said Iron Railroad Company, as the same was on the first day of August, 1881, or has since been constructed or acquired between the Ohio river, in Upper Township, in Lawrence Co., Ohio, and the south line of Jackson County, in said State, including its line from Ironton to Centre Station; its line from Ironton to Sarah Furnace; its line from Aetna Station to Ellisonville; also the Bartels branches, all in said Lawrence County, together with all and singular the right of way, road bed then or since then made, its tracks then or since then laid between the terminal points as aforesaid, together with all the stations, depot grounds, buildings, erections in any way then or since then appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures, then or thereafter held, owned or acquired by said Iron Railroad Company for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights then or thereafter owned by the said Iron Railroad Company in connection with its lines of railroad aforesaid, together with all and singular the powers and franchises thereto belonging, and the tolls, incomes, and revenue to be levied or derived therefrom, as fully described in said bill of complaint filed in this suit, reference to which for greater certainty is now had and made. And said receiver is hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for, and operate said railroad, premises and property; to make reports of his acts and doings to this court every two months at least, or oftener if required by the court; to collect and receive the tolls, issues, rents, and profits of said premises, railroad and property, and out of the same to make such repairs as may be necessary to preserve and keep the same in safe and proper condition. And said receiver is hereby authorized to operate said railroad in connection with any other or others of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company of which he may be appointed receiver; but it is hereby directed to keep the accounts of the
67 earnings, income, issues, rents, profits, and expenditures of the said Iron Railroad Company separate from the earnings, issues, rents, profits, income, and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company. And said defendants, the said Iron Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company, are hereby ordered and directed to deliver to the said William J. Craig, Receiver, possession and control of all the property, rights, franchises, privileges, and assets of every kind above described. And it is further ordered that said receiver make and file a true inventory of all cars, engines, rolling stock, material and supplies above described, as well as of all other personal property coming into his possession, by virtue of this order. And said receiver is further

ordered to keep the accounts of all through freight and passenger business over said constituent roads, so that the receipts therefrom may be apportioned as the court may hereafter direct.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court: and I further certify that this entry was made in this case on a bill brought on October 20, 1883, by the Central Trust Co. of New York, against the T., C. & St. L. R. R. Co., *et als.*, for the foreclosure of a mortgage of the property described in the entry of the appointment and that the bill in cases numbered 3,554, 3,576, 3,577, and 3,578, whereby the same complainants and in whole or in part against the same defendants as in cases No. 3,554, 3,576, 3,577, and 3,578, and were substantially the same in form, proper changes in the descriptions in the property being made, and were brought for like purposes to foreclose other divisions of the T., C. & St. L. R.R.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, O., this 11th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By R. C. GEORGE, *Deputy Clerk.*

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68 **"K."**

Know all men by these presents, that we, William J. Craig, of Toledo, Ohio, as principal, and Albert Netter, Isaac Wolf, Dan'l Wolf, of the County of Hamilton, in the State of Ohio, as sureties, are held and firmly bound unto the Clerk of the Circuit Court of the United States, Southern District of Ohio, in the sum of ten thousand dollars, to be paid to said clerk, his successor in office, or assigns, for which payment well and truly to be made we and each of us bind ourselves, jointly and severally and our respective heirs, executors and administrators firmly by these presents.

Signed, sealed and dated this 23rd day of October, A.D. 1893.

The condition of the above obligation is such that whereas by an order of said court, made on the 20th day of October, 1883, in a cause therein pending wherein the Central Trust Co. of New York, is complainant and the Iron Railroad Company, *et al.*, are defend-

ants, it was among other things ordered, that the above bounded William J. Craig, be appointed receiver of all the property, equitable interests, things in action, and effects of said Iron Railroad Company, and that he be vested with all the rights and powers of a receiver in chancery upon his filing a bond for the faithful performance of his duties, in the penal sum of ten thousand dollars, and the approval thereof by the Hon. John Baxter, Circuit Judge, or by Hon. George R. Sage, sitting in the Circuit Court in said district.

Now, therefore, if the said William J. Craig, shall duly account for what shall come to his hands or control as such receiver and apply the same from time to time as he may be directed by said court, and obey such orders as said court may make in relation to said trust and all respects faithfully discharge the duties of said trust, then the
69 above obligation to be void: otherwise in full force and effect.

WILLIAM J. CRAIG, [SEAL]
ALBERT NETTER, [SEAL]
ISAAC WOLF, [SEAL]
DANIEL WOLF, [SEAL]
CHAS. JACOB, JR. [SEAL]

Signed, sealed and delivered in the presence of
CHAS. RICE,
JNO. R. LONG.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the original bond filed in the clerk's office of said court, on November 1, 1883, in the cause entitled, The Central Trust Company of New York *vs.* The Iron Railroad Company, *et al.*, which cause is numbered 3,579 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, Ohio, this 25th day of January, A.D. 1892. B. R. COWEN, *Clerk.*

By ROBT. C. GEORGE, *Deputy Clerk.*

O. K., J. W. F. C.

70 **"L."**

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Be it remembered, that on a hearing before the Honorable John Baxter, Circuit Judge, sitting at Chambers on the eighteenth day of December, A.D. 1883, the following order was made and signed, and ordered to be entered upon the records of the court, to-wit:

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

In Equity.

The Central Trust Company of New York,
vs.
The Toledo, Delphos and Burlington Railroad Company, *et al.*
} *Entry.*

This cause came on for hearing on the 20th of October, 1883, upon the motion of the complainant, the Central Trust Company of New York, for the appointment of a receiver of all and singular the railroad and premises, property and assets, real, personal and mixed, of the said Toledo, Delphos and Burlington Railroad Company described in said bill, or to which it was entitled at the time of its consolidation with the said Toledo, Cincinnati and St. Louis Railroad Company; upon consideration whereof, the said Toledo, Delphos and Burlington Railroad Company and the said Toledo, Cincinnati and St. Louis Railroad Company appearing and thereto assenting by Henry D. Hyde, Esq., attorney of said respective companies, and the defendant, Braman, appearing and consenting thereto by his attorney, John A. McMahon, Esq., it is now by the Honorable John Baxter, Judge of the Circuit Court sitting at Chambers in the City of Cincinnati, ordered, adjudged and de-
71 creed that William J. Craig be and he hereby is appointed receiver of all and singular the railroad and premises, property, money and assets of every sort or description, of the said Toledo, Delphos and Burlington Railroad Company, or to which at the time of its said consolidation with the said Toledo, Cincinnati & St. Louis Railroad Company, it was entitled upon his giving bond, with security, to be approved by the Honorable John Baxter, Circuit Judge, or by the Honorable Martin Welker, sitting in the Circuit Court of said district, in the penal sum of ten thousand dollars, conditioned for the faithful performances of his duties as such receiver, and for obeying all the lawful orders of the court herein; and that as such receiver he is hereby ordered and directed to take

possession of, maintain and operate the said railroad and premises described in the said bill of complaint, being the railroad of the said Toledo, Delphos and Burlington Railroad, extending from Toledo, in the State of Ohio, through the Counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio, and passing through and into the Counties of Adams, Wells, Huntington, Grant and Howard, in the said State of Indiana (not including the branch line from Delphos, Allen County, Ohio, thence via Spencerville, Menden and Mercer, and through the Counties of Allen, Van Wert and Mercer to Shanesville, Mercer County, Ohio), being about one hundred and eighty miles in length, as fully described in said bill of complaint, reference whereto for greater certainty is now had and made; also to take possession of all the property, real and personal, and all the rights, assets, books, papers and accounts owned by the said Toledo, Delphos and Burlington Railroad Company, or to which it was entitled at the time of its said consolidation with the said Toledo, Cincinnati & St. Louis Railroad Company, and all the equipment, income, franchise and appurtenances thereof, as well as lands and other premises and property belonging to said Toledo, Delphos and Burlington Railroad Company at said time, wherever the same may be within the State of Ohio. And the said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity, to take charge of, care for and operate said railroad; to make reports of his acts and doings to this court at least every two months, or oftener, if required by the court; to collect and receive the tolls, incomes, issues, rents and profits of said premises, out of the same, to make such repairs as may be necessary to preserve and keep the same in a safe and proper condition. And said receiver is hereby authorized to operate said railroad in connection with any other or other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company, of which he may be appointed receiver; but is
72 hereby directed to keep the accounts of the earnings and expenditures of the said Toledo, Delphos and Burlington Railroad Company separate from the earnings and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati and St. Louis Railroad Company. And the said defendants, the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company are hereby ordered and directed to deliver to the said William J. Craig, possession and control of all the property, rights and privileges of every kind belonging to the said Toledo, Delphos and Burlington Railroad Company, or to which it was entitled at the time of its consolidation with the said Toledo, Cincinnati and St. Louis Railroad Company. And it is further ordered that the said receiver make and file in this court a true inventory of all the cars, engines, rolling stock, material or supplies belonging to or in possession of the said The Toledo,

Delphos and Burlington Railroad at the time of its said consolidation, as well as of all other property coming into the possession of said receiver by virtue of this order. And the said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads, so that the receipts therefrom may be duly apportioned between the same, as the court may hereafter direct. And it is further ordered that the appointment of receiver hereby made is limited to so much of said railroad as is within the State of Ohio.

This order is made *nunc pro tunc* as of said 20th October, 1883.

JOHN BAXTER,
U.S. Circuit Judge, &c.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of an order entered upon the chancery order book of said court in the case therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court at Toledo, in said district, this 28th day of January, A.D. 1892, and in the 116th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk*.
By MOLLIE W. BROWN, *Deputy Clerk*.

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73 **"E" 2.**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of April, being also the first day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America, the one hundred and eighth.

Present: The Honorable John Baxter, Circuit Judge, and the Honorable George R. Sage, District Judge.

On Saturday, the 5th day of April, A.D. 1884, among the proceedings had were the following, to-wit:

The Central Trust Co., of New York,
vs.
The Toledo, Cincinnati & St. Louis R.R. Co., *et al.* } *No. 3,554.*

The Central Trust Co., of New York,
vs.
The Toledo, Delphos & Burlington R.R. Co., *et al.* } *No. 3,576.*

The Central Trust Co., of New York,
vs.
The Toledo, Delphos & Burlington R.R. Co. *et al.* } *No. 3,577.*

The Central Trust Co., of New York,
vs.
The Toledo, Delphos & Burlington R.R. Co., *et al.* } *No. 3,578.*

The Central Trust Company, of New York,
vs.
The Toledo, Delphos & Burlington R.R. Co., The Iron Railroad Company, *et al.* } *No. 3,579.*

Application having been made to this court at various times in the above-entitled causes for the payment of divers amounts claimed
74 to be due and owing to various persons, which amounts were claimed to be entitled to priority over the plaintiff in said several causes, after hearing Mr. High and Mr. De Costa, of counsel, for certain owners of cars and equipments now in use by the receiver appointed in said several causes, and on hearing Mr. T. E. Stillman, for the plaintiff, in opposition to such claims, and a suggestion being made that it be referred to a master to inquire and state as hereinafter set forth to the court, it is now ordered that it be referred to Jacob D. Cox, Esq., as Special Master, to inquire and state to the court:

1. The amount of rolling stock, engines, cars, and equipment belonging to the several corporations, mortgagers in each of the above entitled causes at the dates of the respective first mortgages sought to be foreclosed in said suits, and what disposition has been made thereof, by and to whom, and the present condition and value of all such stock, engines, cars, and equipment, the amount and nature of any incumbrances upon such rolling stock at the dates of the said respective first mortgages, and at the present time, and the amount and nature of the existing indebtedness of the several corporations, mortgagers in the above entitled causes in respect to such stocks, engines, cars, and equipments; the amount and kind of the rolling stock for equipment acquired as owner or otherwise by the said sev-

eral corporations, mortgagers, after the dates of the said several first mortgages, and that if any liens or claims exist, which are entitled in equity to priority over the claim of the plaintiff in each of the above entitled causes, upon such stock or equipment, or the property sought to be foreclosed therein, and the amount, if any, due in respect thereof, and as to the disposition made of such stock or equipment, and how much, if any, remains, and in what condition and what value it may be.

2. What, if any, rolling stock or equipment acquired by any, and which of the consolidated companies, known as the Toledo, Cincinnati & St. Louis Railroad Company, after its or their organization, and as to the title thereto, the liens thereon, the present ownership thereof, and as to the amount of the payment, if any, due and to become due from the said consolidated companies, and which of them in respect thereof, and to whom due, and as to the disposition made of such rolling stock, and as to the amount now on hand, and as to the condition and value thereof.

3. What and how much of the said rolling stock or equipments
75 the receiver appointed in the above entitled causes has had in his possession and use since his appointment other than that part of said rolling stock covered by the said respective five mortgages, and generally what use has been made thereof by the present receiver, and what part thereof still remains in his possession and use, and as to the propriety or necessity of the continued use and employment on the said several railroads of any part of the said rolling stock or equipments not covered by the said respective five mortgages, and as to what would be to the owners thereof a fair and just compensation for the past and future use of such rolling stock. What, if any, deterioration or loss it has suffered between the dates of its delivery, and the appointment of a receiver in said several causes, and what since his appointment.

4. How much, if any, and what kind of property was acquired by the said several railroad companies, mortgagors, after the date of the several first mortgages sought to be foreclosed respectively in said above entitled causes, and what monies the same was acquired and what was the present value thereof.

5. What property, if any, the said consolidated Toledo, Cincinnati & St. Louis R. R. Company acquired after its organization in May, 1883, of what kind and description, out of what the same was paid for, in whole or in part, and as to the present state of the title thereto and situation thereof, and as near as may be the value thereof.

6. What liens, legal or equitable, if any, upon said mortgaged premises in said several above entitled causes or any part thereof, exist, their nature and extent, and as to whether prior or subsequent to the said several first mortgages embracing as well claims under car trusts so called as all other claims.

7. The nature and amount of the indebtedness of any of the con-

stituent companies and of the consolidated company separately at the time the receiver took possession of the property, not intending hereby to include any indebtedness growing out of, or connected with rolling stock nor any indebtedness existing under the said several first mortgages or any of them.

8. And it is further ordered that the master, in making inquiries and statements herein directed, consider and treat the several mortgages under which the receiver has been appointed as embracing and representing distinct and independent interests, and that the re-
76 ceiver render and the master state such accounts as may be necessary. That said master inquire and state what, if anything, may be due from the one interest or estate, to the other, and what proportion each should bear in respect of any charges and liabilities in the premises; and to inquire and state to the court what properties, real, personal or mixed, is covered by the said several mortgages.

9. And it is further ordered that upon notice the said receiver appear before the said master and answer any and all questions that may be propounded to him, produce such books, papers and accounts, and give such information in the premises as may be required. And for the purposes of the inquiries herein directed to be made, the master may sit at such place or places, as in his judgment may be suitable or convenient. The master may bring on the hearing by service of notice upon complainant in said several causes, and such notice to claimants as he may think suitable and proper, and may adjourn from time to time, and from place to place.

10. And it is further ordered that all persons who have heretofore filed applications in any of said several causes for relief, may appear before the master and be heard in their own behalf, and that all such persons have the same notice as to the hearing of their respective claims as the parties to any of said several causes.

11. And it is further ordered that the parties respectively have leave to amend their pleadings as they may be advised, in order to properly present for determination, any and all questions that may arise upon the master's report, and, for the like purpose they may bring in new parties, if they shall be so advised, and make such new parties parties to this reference.

12. And it is further ordered that the master shall be, and he is hereby authorized, to examine as to any matters not specifically embraced herein, which he may deem pertinent to the inquiry herein and necessary to the final adjustment of the rights of claimants, or parties in any of said respective causes, and report the same to this court.

13. And it is further ordered that the master proceed in the premises with all convenient speed and report the evidence taken, together with his proceedings and opinion thereon: And as to any matter
77 embraced herein, he may, at his discretion, report the evidence

relating thereto, with his opinion to the court, at such time antecedent to his final report, as he may deem proper.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States of America, within and for the division and district aforesaid, do hereby certify, that the foregoing entry is truly and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, O., this 8th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*

By ————, *Deputy Clerk.*

78

Second "E" 2.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF INDIANA.

May Term, 1884. October 3rd, A.D. 1884.

Before Honorable William A. Woods, Judge.

Edward F. Leonard, *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814. Chancery.*

Come the parties by counsel and file their stipulation that the report of Jacob D. Cox, Special Master, filed in cause No. 7,706, shall be deemed and taken as though filed in the above entitled consolidated cause, &c., and said stipulation is in the words following, to-wit:

CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

E. F. Leonard,
vs.
Toledo, Cincinnati & St. Louis R'y Railroad Co., *et al.* } *No. 7,814.*

Chancery.

The Central Trust Company of New York,
vs.
Same. } *No. 7,815.*

It is hereby stipulated that in the above entitled causes pending in the Circuit Court of the United States, for the District of In-

79 diana, and which have been consolidated under the title of the first-named suit, the preliminary report of the Hon. J. D. Cox, Special Master, appointed in the case of the *Central Trust Company* vs. *The Toledo, Delphos and Burlington Railroad Company, et al.*, pending in said court, shall be deemed and taken as though filed in the above two suits consolidated the same as though the order of reference to him made in said last-named suits had also been made in said two suits so consolidated; and also that the evidence taken by him under said reference and returned with his said report shall be used in the above entitled two suits consolidated the same as though taken therein.

And it is agreed that the clerk of said United States Circuit Court for the District of Indiana may, at the request of either party, make a transcript of said Master's report and evidence and file the same in said two suits, consolidated as aforesaid.

BAKER, HORD & HENDRICKS,
Sols. for Complainants.

HYDE, DICKINSON & HOWE,
Sols. for Toledo, Cincinnati & St. Louis R. R. Co., Defendant.

WILSON & JONES,
Sols. for the American Loan & Trust Co., and the Grant Locomotive Works and R. S. Grant, Petitioners.

JAMES L. HIGH,
Solicitor for the United States Rolling Stock Company, David B. Paul, Trustee, and Pennock Brothers, Petitioners.

ELMER P. HOWE,
Solicitor for the American Loan & Trust Company, Trustee, and E. B. Phillips, Trustee, Intervening Petitioners.

80 DISTRICT OF INDIANA.

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the order of court made and entered in said court on the 3rd day of October, 1884, and of the stipulation filed in said court on the 3rd day of October, 1884, in the consolidated cause of Edward F. Leonard *vs.* Toledo, Cincinnati & St. Louis Railroad Company, *et al.*, No. 7,814, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court this 23rd day of November, 1891. NOBLE C. BUTLER, *Clerk.*

District of Indiana.

I, William A. Woods, Judge of the District Court of the United States, for said district, do certify that at the date of the foregoing certificate, Noble C. Butler was, and now is, the Clerk of the Circuit Court of the United States, for said district, and that his attestations aforesaid is in due form of law.

Witness my hand this 23rd day of November, 1891.

William A. Woods, *Judge.*

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81 **"F" 2.**

The United States of America,
United States Circuit Court,
Southern District of Ohio,
Western Division. } ss.

The Central Trust Company of New York,
vs.
The Toledo, Cincinnati & St. Louis R. R. Co. } No. 3,554.

Same,
vs.
The Toledo, Delphos & Burlington Railroad Co. } Nos. 3,576-77-78.

Same,
vs.
The T., D. & B. R. R. Co., The Iron Railroad Co., *et al.* } No. 3,579.

Preliminary Report of Special Master.

The above entitled causes having been referred to the undersigned as special master, on the 5th day of April, A.D. 1884, under an order of the court made of that date, of which a copy is hereto annexed;

And orders of substantially the same tenor having been made in certain similarly entitled causes by his Honor Judge Drummond, in the Seventh Circuit, and by his Honor Judge Baxter, in others pending in the Northern District of Ohio, Western Division;

And it being desired by counsel for the various parties to said suits that a preliminary report should be made to the Circuit Court for the Southern District of Ohio, at as early a date as might
82 be, so that the sale of certain portions of the consolidated Toledo, Cincinnati & St. Louis Railroad within said district, ordered to be made on the 28th day of June, instant, might be made with as full knowledge as possible of the situation of said several parts of railroads as to liens, as to liabilities for receiver's debts, and

as to rolling stock and other property, the master in accordance with such wish presents this, his preliminary report.

After correspondence with counsel in the cases and with the receiver, the master fixed Thursday, the 1st day of May, for the time of beginning the hearing, and from that date to Saturday, the 21st day of June, the investigation of the cases and the examination of witnesses proceeded with such interruptions as the engagements of counsel made necessary. Mr. Wilson, in appearing, entered a protest, which is filed. At the date last mentioned, testimony was closed as to certain portions of the cases and issues referred, except that it was stipulated that certain depositions might be taken and submitted to the master before this report should be filed.

The testimony taken before the master was by him reduced to narrative form of depositions, with the consent of all counsel appearing, but exceptions to evidence were so noted as to save to counsel any benefit which might properly be had therefrom. Such testimony is submitted herewith, accompanied by notes of the proceedings before the master from day to day, the names of counsel who appeared, and memoranda of stipulations made, of exceptions taken, and of claims set up; all of which is made part of this report.

1. The constituent parts of the Toledo, Cincinnati and St. Louis R. R. and the times of the several consolidations by which the present company was formed.

The present company is the outgrowth of a long series of consolidations of railroad companies in the three States of Ohio, Indiana and Illinois, in regard to which testimony was offered by the parties, though there is no dispute in regard to the history.

As a basis, therefore, for the intelligent understanding of the relations of the several parts of the system to each other, the master would report as matter of fact: that —

The present Toledo, Cincinnati & St. Louis Railroad Co. is formed of two organizations, each of which was itself a complex company, whose history must be separately traced, viz.:

83 A. The Toledo, Cincinnati and St. Louis Railroad Company (in the States of Indiana and Illinois).

B. The Toledo, Delphos & Burlington Railroad Co.

The consolidation of these was made about the 23rd of February, 1882 (ratification by stockholders), and later, *i.e.* on June 1, 1883, the last addition to the consolidated corporation was made by the union with it of the Cincinnati Northern Railway Co., which also carried with it certain alleged rights in regard to the Spring Grove, Avondale and Cincinnati Railway Co., claimed by the Cincinnati Northern Company.

A. *The Toledo, Cincinnati & St. Louis Railroad Company, (in Indiana and Illinois).*

This company was also the product of the consolidation of two

companies of the same name, one in the State of Indiana (a′) and the other in the State of Illinois (a″).

(a′) *The Toledo, Cincinnati & St. Louis Railroad Company, (in the State of Indiana).*

1. Shortly previous to May, 1881, the Toledo, Cincinnati and St. Louis Railroad Company was chartered in Indiana to build across the State from a point east of Kokomo, through Frankfort, Indiana, to a point on the Illinois State line, which is the western terminus of the Frankfort and State Line Railroad.

2. The Frankfort & Kokomo Railroad Co. was then and previously a railroad built and in actual operation from Kokomo, Ind., to Frankfort, Ind., a distance of about 27 miles.

3. On May 20, 1881, the said Frankfort & Kokomo Railroad Co. and the said T., C. & St. L. Railroad Co. were consolidated, the name of the consolidated operation continuing to be the Toledo, Cincinnati and St. Louis Railroad Co.

4. About the same time the Vermilion and State Line Railroad Co. was chartered in Illinois to build a railroad from the western terminus of said T., C. & St. L. Railroad to a point in Vermilion County, Illinois, not definitely fixed, and this company was next consolidated with the said T., C. & St. L. Railroad Company.

84 5. Previous to May, 1881, the Frankfort & State Line Railroad Co. was a corporation of Indiana, authorized to build a railroad from Frankfort, Indiana, westward to a point on the Illinois State Line in Vermilion Co., Indiana. (It should be noted that there is a County of Vermilion in each of the States, Indiana and Illinois, and that these counties are adjacent to each other.) This railroad was partly built at the date above given, and all of it in process of construction. It has never been formally consolidated with any other company, but its relations to the T., C. & St. L. Company will be again referred to.

A″ *The Toledo, Cincinnati & St. Louis Railroad Company, in the State of Illinois.*

1. Previous to May, 1881, there existed in Illinois a railroad company known as the Tuscola, Charleston and Vincennes Railroad Co., which was authorized to build a railroad from the western terminus of the Frankfort and State Line R. R. (above mentioned) southwardly through Charleston to a point near the Peoria, Decatur and Evansville Railroad crossing. It was also chartered to Vincennes, but never used. It was partly built, and in May, 1881, was in process of construction. This was an old company with a special charter.

2. Previous to May, 1881, the Charleston, Neoga & St. Louis Railroad Co. was a corporation in Illinois, authorized to build a railroad from said Peoria, Decatur and Evansville crossing, south of

Charleston, westwardly through Neoga to East St. Louis, opposite the City of St. Louis, on the Mississippi river.

3. In July, 1881, these two last described corporations were consolidated under the name of The Toledo, Cincinnati & St. Louis Railroad Co. (of Illinois). The ratifying vote of the Tuscola, Charleston and Vincennes Company was on the 20th July, 1881, that of the Charleston, Neoga and St. Louis Co., on July 19th.

4. In October, 1881, said Toledo, Cincinnati & St. L. Railroad Company (of Illinois), thus constituted, was consolidated with the before-mentioned Toledo, Cincinnati & St. Louis Railroad Co. (of Indiana). The ratifying vote of the stockholders of the Illinois company was given on October 4, 1881, that of the Indiana company has not been proven.

This last consolidation made the (A) consolidated Toledo, Cincinnati and St. Louis Railroad Company, with a railroad line
85 extending from Kokomo, Ind., to East St. Louis, Ill., on which the mortgage known as the Toledo, Cincinnati and St. Louis mortgage is laid.

This Toledo, Cincinnati & St. Louis Railroad Co. was in possession of the Frankfort and State Line road, and did, in fact, pay the greater part of the cost of construction of this piece of the line, which was completed after the T., C. & St. L. Co. came into possession of it. The stock of the Frankfort and State Line Company, to an extent sufficient to make a controlling interest in the company, is in the hands of the present receiver of the whole property. Other points, relating to this part of the case, will, it is understood, arise hereafter; and the master only reports the facts above as apparently conceded, and subject to future further investigation. They are not essential to the purposes of the present report.

B. *The Toledo, Delphos and Burlington Railroad Company.*

B1. By proceeding consummated in May, 1879, the Toledo and Maumee Narrow Gauge Railroad Co., the Toledo, Delphos and Indianapolis Railroad Company, the Delphos and Kokomo Railroad Company, and the Delphos, Bluffton and Frankfort Railroad Co., were consolidated under the name of the Toledo, Delphos and Burlington Railroad Co.

This company on August 15, 1879, authorized the making of what was called the New Post and Martin Equipment Lease (to be referred to hereafter) and soon after executed what is known as the T., D. & B. main line mortgage. Its authorized lines extended from Toledo to Delphos, Ohio, and thence to Frankfort, Ind., and from Delphos south, apparently to Dayton, O. It was actually built from Toledo, through Delphos westward as far as Warren, Ind., and from Delphos south as far as Mercer. The main line mortgage, so called, was laid upon the line from Toledo to Delphos and thence west to Kokomo, with the usual clauses as to after-acquired property.

B2. The Dayton, Covington & Toledo Railroad Company was a corporation in Ohio, authorized to build a railroad from Dayton northward through Coving. & Delphos to Toledo. It seems to have built its road to Versailles, 38 miles south of Mercer, and the T., D. & B. (B1) had extended its line south of Mercer to the same
86 point, when in June, 1880, the two companies were consolidated, under the continuing name of the Toledo, Delphos & Burlington Railroad Company.

The latter company (T., D. & B.) ratified the consolidation by stockholders' vote June 18, 1880, the C., D. & T. having previously done so.

Said Toledo, Delphos and Burlington Railroad Company then executed and laid upon the line between Delphos and Dayton, what is called the Dayton Division mortgage, covering part of the line of the T., D. & B., and the line of the D., C. & T., making one line between Delphos & Dayton, and ending at Third Street in Dayton, to which point the D., C. & T. Company had acquired track rights prior to the consolidation, and which point is the dividing line between the divisions of the present T., C. & St. L. Co.'s road, and the mortgages.

(B3) 1. The Dayton and South Eastern Railroad Co., was chartered in Ohio, to build a railroad from Dayton, southeasterly through Xenia, Washington C. H. and Chillicothe to Gallipolis, on the Ohio River. Prior to the consolidation next mentioned it had its road actually built as far east as Wellston, Jackson Co., Ohio. In March, 1881, the D. & S. E. Co. was consolidated with the Toledo, Delphos and Burlington Co. The stockholders of the T., D. & B. ratified the consolidation on March 17, 1881, those of the D. & S. E. having previously done so. The T., D. & B. Co. thus consolidated (B3) executed and laid the mortgage known as the Southeastern Division mortgage upon its line from Third Street in Dayton eastward to Wellston, and on the Ironton branch.

2. This T., D. & B. Co. (B3) acquired the right to build the Ironton branch last named, from a point near Wellston, in Jackson Co., O., southward to a point near the City of Ironton, in Lawrence Co. on the Ohio river. This branch was partly built in the summer of 1881, and was completed just before the receivership began.

3. The same T., D. & B. Co. (B3) also acquired in the summer of 1881, the right to build a branch from a point on the Southeastern Division about six (6) miles east of Dayton (now called Lebanon Junction) southwardly through Montgomery and Warren Counties, Ohio, towards Cincinnati, and to a station called Dodds, on the Cincinnati Northern Railway about two (2) miles north of Lebanon.
87 The branch was built, and the T., D. & B. Co. laid thereon the mortgage since known as the Cincinnati Division mortgage.

(B4) 1. The Iron Railroad was a corporation in Ohio authorized to build a railroad from Ironton, on the Ohio river, in Lawrence

County, to a point in Gallia County, which does not seem to have been definitely fixed. It was actually built to a point known as Centre, in Lawrence Co.

2. Prior to the consolidation next to be mentioned, the Iron Railroad Co. executed and laid upon its road and property the mortgage known as the Iron mortgage; and, prior to the execution of this mortgage, it had entered into a contract with the T., D. & B. Co. (b3), known as the Third Rail track-right, under the statute of Ohio authorizing railroad companies to aid each other. By this contract the T., D. & B. Co., acquired the right to lay a third rail upon the road-bed of the Iron Railroad from Centre to Ironton, completing thereby the means of connection for the narrow-gauge system with the City of Ironton and the Ohio River.

3. In October, 1881, the Iron Railroad Company was consolidated with the Toledo, Delphos and Burlington Railroad Company, the stockholders of the Iron Co. voted to ratify the consolidation on Oct. 21, 1881, the date of the action of the stockholders of the T., D. & B. Co., is not in evidence. The Iron Railroad is a standard gauge road, of 4 feet 8½ inches gauge, and is the only exception in the whole system, all the other constituent roads being of the narrow or three feet gauge.

This last consolidation made the (B) consolidated Toledo, Delphos and Burlington Railroad Co. with its lines extending from Toledo through Delphos to Kokomo, and from Delphos through Dayton to Wellston, to Ironton and to Dodd's Station on the Cincinnati Northern Railway. It is not alleged that this consolidated T., D. & B. Company executed any mortgage upon its line as a whole.

4. The Toledo, Delphos and Burlington Railroad Company, after the consolidation last named and before its consolidation with the T., C. & St. L. Railroad Co. had initiated steps towards an extension of the line of the road by a branch reaching from Wellston to several iron mines, coal mines, and iron furnaces, known as the Buckeye branch, about 10¾ miles in length. The branch was completed after consolidation with the T., C. & St. L. Co. The
88 legal title has not been placed in either company, and the relations of the finally consolidated company to it will depend upon a settlement of its affairs with the Delphos Trust, an organization to be hereinafter referred to. The whole subject will receive further attention in a later part of this report.

The consolidation of the Toledo, Delphos and Burlington R. R. Co. with the Toledo, Cincinnati & St. Louis Railroad Company, and the final addition of the Cincinnati Northern Railway Company to the systems, by the last consolidation of all, have been already noted (p. 2 *ante*), and the history of the consolidations is thus completed. The line of the Cincinnati Northern Railway extended from its terminus at Court street in Cincinnati to Dodd's Station in Warren

County, O., with perpetual leasehold of a branch already referred to as the Spring Grove, Avondale and Cincinnati Railway.

II. *Liens upon portions of the line of the railroad, prior to the several mortgages upon which these suits are brought.*

a. The Dayton Division, being that part of the railroad line between Delphos and Third Street in Dayton.

1. The so-called Counterman mortgage on the Shanesville branch.

Prior to the completion of the line between Delphos and Dayton, there was a small local railroad begun, between Mendon on this Dayton Division and Shanesville, a small town off the line, going by way of Mercer which is also on the Dayton Div., so that three and seventh-tenths miles (3.7) of this Shanesville road, being the part between Mendon and Mercer, now constitute a part of the Dayton Division as operated and a necessary part of the main line. The rest of this small road from Mercer to Shanesville, four and three-tenths miles (4.3) is strictly a branch westward from the main line, and has no apparent value at present. The Dayton Division mortgage by the description of the road covered by it, included at least the portion of the Shanesville road between Mercer and Mendon, and by fair implication the branch to Shanesville also a short feeder or sidetrack, part of the Shanesville road which has thus been incorporated into the Dayton Division.

This Shanesville road was partly built by the Toledo, Delphos and Indianapolis Railroad Company, one of the constituent
89 parts of the Toledo, Delphos and Burlington Railroad Company, and by the consolidation was incorporated into the property of the latter company. (See b 1, p. 6 *ante.*)

The Toledo, Delphos and Indianapolis Co. had, prior to the above-mentioned consolidation, and in December, 1879, given a mortgage on the line and track between Mendon and Shanesville to Jacob Counterman, Lewis Finalman and Henry Van Tilberg to secure the sum of $8,979.20 with interest at 8 per cent. from December 15, 1879, for work, labor and materials in the construction of said piece of road.

After the formation of the consolidated Toledo, Delphos and Burlington Railroad Co., the said mortgagees, Counterman and others, foreclosed the mortgage taking judgment for the sum above mentioned with interest and costs, and a decree of sale of the mortgaged premises.

The master finds that an organization known as the Delphos Trust, (to be hereafter more fully referred to) paid to said mortgagees, through the medium of A. A. Thomas, Esq., Gen. Attorney of the T., D. & B. Co., the amount of the judgment and costs, and took an assignment to the American Loan and Trust Co., of Boston, Mass., as trustee of both the mortgage and the judgment. This was done on April 13, 1882, the judgment then amounting to $10,447.53 and

$16.25 costs, being a total of $10,463.78. No payment has been made by the T., D. & B. or by the T., C. & St. L. Railroad Companies, and the judgment and decree and the original mortgage remains a first lien on said piece of road prior to the so-called Dayton Division mortgage, subject, however, to an accounting between said railroad company and the said Delphos Trust, between whom a general debit and credit account is open, with a claim on behalf of the creditors of the Railroad Co., that on such full accounting a balance of debits will be found against said Delphos Trust. This accounting has not yet been reached by the master.

2 *The Soldiers' Home branch in Dayton.* The master finds that this is a branch leaving the Dayton Division about two miles north of Dayton, and running to the National Asylum for disabled soldiers known as the Soldiers' Home. It was built by the Toledo, Delphos and Burlington Railroad Co. through a company called the Western Construction Co. as its intermediary, the cost being paid by said Railroad Co. It is a valuable feeder of the main line, and the
90 master finds as matter of law that as "after acquired property" it is part of the Dayton Division, and subject to the mortgage known as the Dayton Division mortgage.

Connected with this branch is a contract liability which the master finds to be in the nature of a lien or of a condition precedent, which the purchaser of said Dayton Division may be called upon to fulfill. It is alleged by the authorities of the Soldiers' Home that the Railroad Co. agreed to build a station house or depot in the grounds of the Home as a condition of the license to enter said grounds and lay their track there, and the enjoyment of the use of such grounds has been interrupted for lack of performance, as alleged, of said condition. The particulars of the claim have not been submitted to the master, and he can only report that the sale of said division should be made with notice of such claim, which in his opinion, it is for the interest of the property to satisfy.

3. *Track rights in the City of Dayton.*

By contract originally made between the Dayton, Covington and Toledo Railroad Co. (b 2, p. 7 *ante*), and the Cincinnati, Hamilton and Dayton Railroad Co., the former acquired the right of use of the C., H. & D. road bed and track from a point west of the railroad bridge in Dayton, across the bridge and to the Union passenger depot in that city, with rights of track in the yard and street frontage for the purposes of a freight depot. On account of alleged delay in a payment of rent for these privileges, the C., H. & D. Company has instituted proceedings in Montgomery County to forfeit the rights, but have been enjoined from interrupting the same pending these proceedings. The C., H. & D. Company has not appeared before the master, who can therefore only report upon *ex parte* submission of testimony. The rental is $5,000 per annum, payable quarterly, and

the evidence before the master warrants the finding that since the beginning of the controversy above mentioned legal tender has been made by the T., C. & St. L. Co., or by the receiver. The rights and privileges are conceded to be very important, if not essential, and the sale of the division should be made subject to the rentals and inclusion of the rights of the T., C. & St. L. Co. in said contracts.

There are also similar contracts with the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Co., and with the Pittsburgh, Cincinnati and St. Louis Railway Co., for small track rights or easements in Dayton, necessary to make satisfactory working con-
91 nection between the Dayton Division and the Southeastern Division. They also require the payment of an annual rent, subject to which the sale of the division should be made, such easements being appurtenant to said Dayton Division. The particulars of said contracts have not been put in evidence, but they are alleged to be prior in date to the Dayton Division mortgage, and the rentals to be moderate in comparison with the value to said divisions of the connections thus assured.

b. *The Southeastern Division.*

1. East of Third street, in the City of Dayton, and upon the Southeastern Division, the T., C. & St. L. Company has the occupation of a valuable depot ground under a lease from the City of Dayton, running with a right to cover over and use the Hydraulic Canal in Dayton for a distance of about four squares, the particular manner in which this shall be done being specified in a contract between the railroad company and the Hydraulic Co. The rental to the city is merely nominal, being $100 per annum.

The Railroad Company have put a temporary obstruction in the Hydraulic Canal, which has been continued longer than originally agreed, and parties in interest are pressing for the performance of the contract as to the method of covering the canal, etc.

The master finds that said depot grounds and privileges are appurtenant to the Southeastern Division and should be sold with it, subject to the rental and agreements aforesaid.

2. On the Southeastern Division, the railroad company uses from 6 to 8 miles of the track of the Cincinnati, Washington and Baltimore Railway by agreement formerly made with the Marietta and Cincinnati Railway Co. This is between Baker's Junction and Byer's Junction, in Jackson County, Ohio. A third rail has been laid under the contract which conveys the right so to do. The rental is $500 per month, being computed upon an agreed estimate of six per cent. upon the cost of constructing an independent line over that portion of the Southeastern Division, which is there mountainous and difficult for railway building. The rentals have been paid, and the right is considered to be a valuable and useful one. The master

finds that it is appurtenant to the Southeastern Division and should be sold with it, subject to the rental hereafter falling due.

92 3. Between Dayton and Xenia the Southeastern Division runs for some miles upon a right of way granted by the Pittsburgh, Cincinnati & St. Louis Railway Company. A controversy is in litigation between the companies on an alleged failure of the T., C. & St. L. to keep up the fences as agreed, by reason whereof it is asserted that the P., C. & St. L. Company has been subjected to damages through having to pay for cattle killed. The litigation may indirectly involve the right of way over the portion of the road mentioned, and in the master's opinion the purchaser of the Southeastern Division should, but with notice of the controversy.

4. One F. B. Douglas, a contractor who finished the extension of the Southeastern Division from Wellston to Ironton, has taken judgment in Lawrence County against the T., C. & St. L. Co. for about $17,000 upon a balance admitted to be due him on construction account. He also claimed a mechanic's lien in the same suit, but the issue as to this has been continued and has not yet been determined, it being contested by the company. In the master's opinion the purchaser of the Southeastern Division should, but with notice of this controversy.

5. There are several small suits pending in Ross and Lawrence Counties on alleged defective rights of way, the particulars of which have not been put in evidence. The amounts in controversy are reported as small, even in the aggregate, but in the master's opinion, the purchasers of the Southeastern Division should, but with notice of them.

The above are all the underlying liens, outstanding contracts, liabilities and claims which have been brought to the master's notice as affecting the Southeastern Division.

C. *The Iron Railroad.*

The only claim to an underlying lien upon the Iron Railroad which has been presented to the Master is a judgment in the Lawrence Co. Court of Common Pleas in favor of John S. George against said Iron Railroad Co. in a suit began before its consolidation with the Toledo, Delphos & Burlington R. R. Co. for damages by reason of its appropriation of a right of way along the premises of said George. Said suit was begun on the 18th day of June, A.D. 1881, and judgment was rendered therein at the November Term, A.D. 1883, for $500 damages and $84.87 costs. Said John S. George is still, as the

93 master finds, the owner of said judgment, and the same is unpaid and unsatisfied, and said suit was begun before the making of the mortgage upon the Iron Railroad sought to be foreclosed in these proceedings, though judgment was not taken till long thereafter, and after the consolidation with the Toledo, Delphos and Bur-

lington Railroad Co. and of the latter with the Toledo, Cincinnati and St. Louis Railroad Co.

D. *The Cincinnati Division.*

No claim to any underlying lien has been presented before the master as an existing liability of this division prior to the division mortgage.

E. *The Cincinnati Northern Railway.*

Upon this division, extending from Cincinnati to Dodd's Station several claims of liens upon property purchased by the Cincinnati Northern Railway Company have been presented, as follows:

1. Mortgage to Emily C. Nye by Morris White, Trustee, dated Feb. 20, 1882, to secure note of $1,000, being part of the purchase money of a lot 50 feet wide and 140 feet deep, on the N. E. corner of McMillan and Home streets, West Walnut Hills, Cincinnati. The principal and interest from Feb. 20, 1883, at 6 per cent. is due.

2. Mortgage to T. J. Chapman by Morris White, Trustee, dated ———— to secure note of $————, being part of the purchase money of lots 13, 14 and 15, and part of lots 16, 17 and 18, in Thomas French's Sub-division of lots in Avondale, near Cincinnati. The mortgage covers the whole of the property, but only so much as was necessary for railway and depot purposes was deeded by White, Trustee, to the Cincinnati Northern Railway Co., and the rest was deeded to George Hafer, Trustee, to sell and apply the proceeds to extinguish the purchase money mortgage.

3. A mortgage to Joseph G. Langdon by the Cincinnati Northern Railway Co. to secure two notes of $886 each, dated June 1, 1881, and payable respectively in one and two years after date, with ———— interest. The mortgage is upon property at the Norwood Crossing of the Cincinnati Northern with the Cin., Washington and Baltimore Railway, for which the notes were given in part
94 settlement of purchase money. The face of the notes with interest from June 1, 1883, is due.

4. The line of the Cincinnati Northern occupies a small cover of Lot No. 4, Hopkins' Second Sub-division at Norwood, belonging to James P. Walsh, of Newport, Ky., with whom no settlement has been made, though negotiations have been progressing. The owner, however, as is alleged, only claims $100.

5. The same road runs through a corner of what is known as the McCullough farm at McCullough Station. A grant of right of way to the Miami Valley Railroad Company was defeated by their failure to comply with a condition as to time of completing the road. The Cincinnati Northern Ry. Co. succeeded to the rights of the last-mentioned Company, and was permitted to construct its road through the McCullough, a distance of 200 or 300 feet. The farm has since become the property of the estate of Joseph Longworth, deceased, and negotiations have been pending, on the basis of the establish-

ment of a station there, as a consideration for a grant of the right of way, but no contract has been made.

6. The same line passes through the farm of Jno. W. Kennedy, deceased, near the eight mile house, Sycamore Tp., Hamilton Co. The heirs of Kennedy claim about $500 for the right of way, under an agreement, which the company disputes, insisting upon another and prior agreement for a free passage through the lands. Some testimony has been taken before the master on this claim, but by consent of parties the further hearing is postponed.

7. The Cincinnati Northern also occupies, for road-bed, depot grounds and other necessary railroad purpose, several tracks of land under leases, covenanting for the payment of annual rental. Among these is a lease of two lots, one on the N. W. corner of Court street and Deer Creek road, in Cincinnati, and the other on the west side of the Deer Creek road, north of the last, from the estate of George N. Hunt, deceased, E. C. Baldwin, agent, at a quarterly rent of $678.99. One quarter's rent was due on April 1, last, and another will be due on 1st July proxo.

8. Another leasehold lot, is that of Minerva E. Dominick, on the west side of Deer Creek road, between Court street and Effluent Pipe street in Cincinnati, at a quarterly rental of $120.90. One quarter's rent was due on April 1, last, and another will be due on 1st July proxo.

95 9. Another leasehold lot of the City of Cincinnati, being part of Eden Park, on the south side of Effluent Pipe street, at a quarterly rental of $65.13. One quarter's rent was due on April 1st, last, and another will be due on 1st July proxo.

10. Another leasehold lot is that of the City of Cincinnati, being part of Eden Park, on the north side of Effluent Pipe street, at annual rental of $1,000. One year's rent ($1,000) was due the 20th day of March, last. No other payment will be due till the 20th of March, 1885.

11. Another leasehold lot is that of Wm. M. Ramsey, assignee to Eliza Tomlinson, between the Eden Park property and the Montgomery road, at a quarterly rental of $27.00. One quarter's rent was due on April 1st, last, and another will be due on 1st July proxo.

None of the rentals above-mentioned as due have been paid, and are, therefore, still due.

As to several of the mortgage debts of the Cincinnati Northern Railway Co. mentioned above, the master finds that the increase in market value of the parts not necessary for railway purposes will go far toward satisfying the mortgages, the trust deed to Geo. Hafer and others having been made for the purpose of enabling a sale to be made of such excess, to apply the proceeds to satisfy the mortgages. He therefore recommends that at the sale of the railroad, the right of the company to have such liens satisfied out of such pro-

ceeds be made known to bidders and be declared an incident to the title to the property which will be transferred by the sale.

As to the unsettled rights of way above named, the master recommends that the sale be subject to such claims which the purchaser will settle. Any vested rights the company may have, by contract or otherwise, passing with the property, except the Kennedy claim.

As to the leaseholds above mentioned, the term is and the master recommends that they be sold as appurtenances of the general railway line and property.

As to the Kennedy heirs' claim for right of way, as the same has been partly heard upon testimony submitted, the master recom-
96 mends that the sum of five hundred dollars of the proceeds of the sale be retained in the registry of the court till final report thereon may be made.

So far as the master has been able to learn, the above constitute the only claims in the nature of liens or of real contracts constituting liens, liabilities, or clouds on the title of the T., C. & St. L. Company and the several constituent companies in lands south and east of Delphos, Ohio, except unpaid taxes. Several leases of small lots of land have been made by the Spring Grove, Avondale and the Cincinnati R. R. Co., which will pass by the general lease of that road to the Cin. North., subject to the rentals which will be hereafter reported.

As to all the other constituent parts of the railway system of the defendants, there has not as yet been time to make full investigation and complete the hearing, and nothing is reported as to them at this time. The object of this preliminary report being to enable the court to give such directions as may be necessary regarding the sale of the portions of the road so described, soon to be made.

III. *Indebtedness of the receiver, accrued since the appointment of the first receiver.*

This can only include a balance of debts over assets and income, after the application of assets which came into the receiver's hands from the corporation to payment of corporation debts ordered by the courts to be paid.

The master finds the total liabilities of the receiver, on vouchers, pay-rolls, &c., to be on the 1st day of April, 1884, $336,180.60.

97 Due to the Iron Railroad, being excess of earnings over expenses on that line 33,716.37

Receiver's certificates issued 181,618.09

Taxes remaining unpaid (see below) . . . .

Rental upon rolling stock during the Receivership as is hereinafter more fully reported upon. (To July 1.) 403,997.00

Probable deficit in Receiver's income for April, May and June	100,000.00
Total am't of liabilities of the Receivership on July 1, 1884	1,055,512.06
Estimated value of assets	74,322.42
Excess of liabilities over assets, July 1	$981,189.64
Collected from corporation assets	58,915,62
Receiver's certificates issued for debts on account of Frankfort & State Line R. R.	113,941.89
Paid on account of Toledo Terminal Trust	86.75
Receiver's certificates issued for rights of way on Cincinnati Northern Ry.	25,176.20
Taxes yet to be paid (see below p. 52)	
Rentals upon rolling stock	403,997.00
Probable deficit for April, May and June	100,000.00
Amount brought over from last page	279,072.18
Total	$981,189.64

being the same amount before reported as the excess of receiver's liabilities over assets on July 31, '84. The distribution of this indebtedness to the several divisions of the railroad which the master finds to be equitable is hereinafter reported.

IV. *The indebtedness of the Toledo, Cincinnati & St. Louis Railroad Co. at and prior to July 31, 1883, exclusive of mortgage debts.*

At the request of counsel for various parties, the master states this indebtedness under two heads, viz: (a) the indebtedness in the nature of operating expenses, *i.e.*, incurred within six months prior to the receivership, *i.e.*, between Feb. 1st, and July 31, 1883, and (b) all other floating indebtedness of the company.

(a) Floating debt in the nature of operating expenses incurred within the six months prior to the first appointment of a receiver by the courts.

98 Toledo, Cin. & St. L. vouchers for supplies, &c., audited at Toledo office, Schedule F	$260,979.54
Cin. Northern vou. for supplies assumed by T., C. & St. L., but not pd., Schedule G	3,920.14
Iron Railroad " " " Schedule G	1,396.25
T., C. & St. L. expenses audited at Boston office, Schedule H	6,740.72
Sundry unregistered vouchers, Schedule L	1,871.43
Total of such operating expenses	274,908.08

The master finds accounts with "foreign roads," which consist of

balances on interchange of tickets to supply ticket offices, interchange of car service, etc., and that such balances are not according to the custom of railway business on extension of mercantile credit between the companies, but a species of mutual agency and trust for the purpose of momentary convenience, essential to the successful management of such companies. He finds that such receipts by the companies respectively are in the nature of a special trust fund, held for the benefit of the other, and are not assets belonging to such company. He, therefore, reports that in his opinion such accounts with "foreign roads" should be treated as a preferred indebtedness, and paid accordingly.

Amount as per Schedule E	6,178.78
Same on Cin. Northern, as per Schedule D . .	187.69

This statement of debts and assets of the receiver is made from the receiver's books, as per schedules furnished by the auditor (Schedule R), and from the testimony before the master.

The receiver having, under orders of the court, kept his accounts in such a manner as to show the earnings and expenses of the several divisions of the road separately since Nov. 1, 1883, an analysis of such accounts shows an excess of expenses over income on all the divisions of the road except the Iron railroad, as stated below. The account with the Iron railroad shows a balance of income over expenses, amounting on April 1st to the sum of $33,716.37, as above noted.

99 EXCESS OF EXPENDITURES OVER INCOME.

Toledo Terminal, Nov. 1, '83, to April 1, '84 . .	3,259.79
Toledo Division " " . .	104,585.04
St. Louis Div. " " . .	61,682.50
Dayton Div. " " . .	15,222.60
Dayton & S. E. Div. " " . .	38,633.79
Cin. Div. " " . .	4,652.02
Cincinnati Northern " " . .	21,098.18
On all Divs. Aug. 1, '83, to Nov. 1, '83, except the Cin. Northern	26,583.21
Cin. Northern Ry., Aug. 1, '83, to Nov. 1, '83 . .	3,355.05
Total of such excess to April 1, '84 . .	279,072.18

The receiver has expended for corporation debts ordered to be paid above the sums:

Toledo indebtedness to foreign roads . . .	6,366.47

It is claimed by counsel for some of the car trusts, so-called, that a rental for rolling stock, prior to the receivership for six months, should be included in the necessary operating expenses for that period. The subject is more fully reported upon hereinafter, but it

the court shall hold that such rentals should make a part of such operating expenses, the master finds and would report the same for such period of six months to amount to the sum of 220,362.00.

b. Other floating indebtedness of the T., C. & St. L. Company, not included in the foregoing:

Operating expenses prior to Feb. 1, 1883, on the T., C. & St. L. Railroad, not paid, Schedule A .		18,956.24
Do. on Cin. North'n, Schedule C		4,856.66
Vou. settled by note, " K		
T., C. & St. L.		120,496.22
Cin. Northern		4,963.79
Sundry claims, Schedule J		94,298.49
Chiefly claims for construction work.		
100 Of these there has been paid by the receiver, under orders of court, or settled by receiver's certificates	108,383.94	
Amount above	94,298.49	
Total at app. of Rec. . .	202,682.43	
Unregistered vouchers, Schedule L,		508.28
Sub. to Feb. 1, '83 . . .	1,871.43	
Part of Schedule L above . .	508.28	
Total of Schedule L . .	2,379.71	
Total floating debt of T., C. &. St. L., not included in or classified under former heads . .		244,079.68
Bills payable of the Cincinnati Northern railway. — The books of the company show (Schedule B) outstanding notes of the Cincinnati Northern Ry., amounting to		162,193.50
Of them, by far the greater part, to-wit		157,108.53
Are either for purchase money of real estate, fully secured by mortgages, or otherwise secured, leaving only the sum of		5,084.97

which sums to represent debts due for current operating expense of that road before its consolidation with the T., C. & St. L., and

within the period of six months prior to the appointment of a receiver in these cases, or by the courts on the original Braman bill.

If the court shall determine that the general operating expenses for the six months period last mentioned shall be paid out of the purchase money of the road, then said sum of $5,084.97 would have to be added to that class of indebtedness of the T., C. & St. L. Co. above reported.

The Cambria Iron Co. makes claim for 22,943. for steel rails and prepaid freight, in the month of July, 1883, and demands a
101 specific lien on the rails themselves. Time has not been sufficient for a full hearing in this as in some other specific claims. It is included in the amount of operating expenses within the six months prior to the appointment of a receiver, and if the court shall order such expenses to be paid as preferred debts, it may be included therein, and the question of specific lien will be unimportant.

The master finds that the rails were about one-half laid in the Dayton and Southeastern Division, and the other half in the Toledo Division, and that the quantity was not in excess of what would properly be regarded as reasonable repairs to keep the track in operating order.

If the court shall refuse to order the operating expenses for the six months prior to the receivership to be paid, the master would recommend that the purchasers of the Dayton and S. E. Div. be required to deposit an additional sum of money sufficient to meet one-half of said claim, subject to the future determination by the court of the question of such alleged specific lien.

V. *Rolling Stock and Car Trusts.*

The master has reserved for separate consideration the important questions relating to rolling stock, although by the statement above given, the sum which he finds to be a fair rental on the rolling stock not owned by the company, and yet used by the receiver, has been incorporated into his finding as to the indebtedness of the receiver.

The subject divides itself into two principal parts, viz.: *(a)* what rolling stock belonged to the several constituent roads when the mortgages were laid upon them, and should therefore necessarily be sold with the roads; and *(b)* what rolling stock is covered by the several so-called equipment leases and car trusts, and what is the status of this part of the equipment.

(a) What rolling stock belonged to the several constituent roads when the mortgages were laid upon them and should, therefore, necessarily be sold with such roads.

The master finds that in general it has been the custom of the managers of this railway system (except at the consolidation with
the Cincinnati Northern) to leave upon the equipment the letter
102 and marks which it bore when each constituent road was a separate organization and owned its own rolling stock. If there be another exception to this rule it will be found in the case of en-

gines and cars which, it is alleged, were put into Car Trusts and remarked, after such mortgages had been made. This allegation will be subsequently considered. The master here confines himself to the engines and cars about which the evidence leaves little or no room for dispute.

1. *The Iron Railroad.*

The determination of the question in regard to this constituent of the system is simplified by the fact that it is a standard gauge road, having no immediate connection of similar gauge and that its rolling stock, therefore, of necessity remains upon it.

The master finds that the standard gauge rolling stock belonging to the Iron Railroad consists of five (5) locomotives, two (2) passenger coaches, and two hundred and eighteen (218) coal cars, and that these are so marked and numbered that there is no difficulty in identifying them.

2. *The Cincinnati Northern Railway.*

The master finds that at the time of the consolidation of this railway with the T., C. & St. L. system it was the owner of the following described rolling stock which was also covered by its mortgage, viz., seven (7) locomotives, twelve (12) passenger coaches, one (1) baggage car, forty-seven (47) flat cars, and ten (10) box cars.

The master finds that after such consolidation six of the above mentioned 7 locomotives were re-painted and have since been marked T., C. & St. L. Nos. 2, 4, 96, 55, 56, 77. The other of the seven had been injured in an accident, and is at the Delphos shop of the T., C. & St. L. unrepaired and bearing its original mark, No. 4, Cinti. Northern, though it is registered on the records of the T., C. & St. L. Railroad as No. 54, T., C. & St. L.

The master further finds that both in regard to said engines and in regard to the coaches and cars, the records of the present company make it easy for the receiver to identify them, and to turn them over (excepting any that may be destroyed) to the purchaser of said Cincinnati Northern Railway, if the court shall so order.

103 The master further finds that at the time of the consolidation last referred to, the Cincinnati Northern Railway Co. was in possession of and turned over to the T., C. & St. L. Railroad Co., other rolling stock marked "Cincinnati Northern Railway, Avondale Branch," to-wit: four (4) locomotives, numbered respectively, 8, 9, 10 and 11, two (2) passenger coaches, numbered respectively, 13 and 14, forty-five (45) box cars, numbered 211 to 255, inclusive, and fifteen (15) stock cars, of which the numbers cannot be now given. This "Avondale Branch" rolling stock was included in a contract between the Cincinnati Northern Railway Co., and the Railroad Equipment Co., of New York, and is commonly referred to by the officers of the railway as the Post Martin Rolling Stock, from the name of the firm constructing and furnishing it. It will

be again referred to under the head of Car Trusts, but is here mentioned for the purpose of stating the finding of fact as to its possession, and the further finding that said locomotives are now marked and numbered as follows, to-wit: T., C. & St. L., Nos. 48, 49, 50 and 90, respectively. The said coaches and freight cars as well as said locomotives are easily identified by the records of the car accountant, and the receiver will be able, without difficulty, to obey any order the court may make in regard to them, excepting any that may be destroyed.

3. *Dayton and South Eastern Division.*

The master finds that upon the 4th day of June, 1882, (the beginning of keeping systematic car accounts on the T., C. & St. L. Railroad) there were, on the line, cars marked D. & S. E., which were presumably of the original equipment of the Dayton and South Eastern Division Railroad, as follows: Two (2) passenger coaches, two (2) combination passenger and baggage cars, three (3) box cars, twelve (12) coal cars, twenty-six (26) flat cars, eight (8) stock cars, twenty-two (22) extra narrow gauge trucks for transportation of standard gauge car bodies.

The master finds that said rolling-stock is also easily identified, that the same belonged to the Dayton and South Eastern Railroad Co., and should be treated as covered by the mortgage of that division.

Testimony was introduced, tending to show that part of the rolling stock belonging to the Dayton and South Eastern Railroad, was, after its consolidation into the Toledo, Delphos and Burlington Railroad Co., re-marked, and put into Boston Car Trust series.
104 There has not been time for completing the investigation of this matter, and fully determining either the fact of such transfer, or whether it was in derogation of any rights of mortgagees. Such order as equity may demand can be made at a later stage of the proceedings, and the master is unable at present to report upon the same.

4. *Cincinnati Division.*

No testimony has been introduced tending to show that any rolling stock ever belonged separately to this division.

5. *Dayton Division.*

Into this division was incorporated the original Dayton, Covington & Toledo Railroad, and the master finds that on the 4th of June, 1882, there were certain cars marked D., C. & T., which had originally belonged to said Dayton, Covington & Toledo Railroad, and which are presumably covered by the mortgage of the Dayton Division, to-wit: one (1) passenger coach, one (1) combination passenger and baggage car, eight (8) box cars, eight (8) flat cars. He further finds that these cars are, like the former, easily identi-

fied, and any order of the court in regard thereto may be readily obeyed.

6. *Toledo, Delphos and Burlington.*

The master finds that of the rolling stock originally belonging to the Toledo, Delphos and Burlington Railroad Co., or the companies which constituted it, and which is presumably covered by the Toledo, Delphos and Burlington main line mortgage, there was on the road on the 4th day of June, 1882, the following, to-wit: Eleven (11) locomotives, four (4) passenger coaches, four (cabooses), sixty-four (64) box cars, eighty-two (82) coal cars, one hundred and twenty-six (126) flat cars, eight (8) stock cars, four (4) extra narrow gauge trucks for transfer of bodies of standard gauge cars. All of these, like those before reported upon, are easily identified and made subject to any order of the court.

7. *Toledo, Cincinnati & St. Louis. (Old.)*

The master finds that of the rolling stock originally belonging to the Toledo, Cincinnati & St. Louis Railroad Co. (A. page 2a 105 above) prior to its consolidation with the Toledo, Burlington and Delphos Railroad Co., or to the companies which formed said (old) T., C. & St. L. Co., and which should presumably be sold with the St. Louis Division of said road, there was on the road on the 4th day of June, 1882, the following, to-wit: One (1) locomotive, formerly belonging to the Frankfort and State Line Railroad Co., and one (1) caboose.

All the rolling stock put upon the road since June 4, 1882, except five locomotives leased by Receiver Dwight, appear by the testimony thus far submitted to the master to have been included in the several "car trusts" hereinafter described and referred to and the property of the T., C. & St. L. Railroad Co. therein must be determined by those instruments.

It is alleged in regard to the Toledo, Delphos and Burlington Railroad Co. (as has also been noted in regard to the Dayton & S. E. Division) that rolling stock which belongs to it is included in one of this "Car Trusts," but the case has not yet been submitted on that point, and for the present purposes of this report it is not necessary to pass upon it.

b. Car Trusts.

By far the greater part of all the rolling stock upon this whole railway system, is included in certain contracts known as equipment leases, all of which have the same general character.

1. In them the manufacturer, owner or other person in possession of engines, cars, &c., contracts to "loan" to the Railroad Co., termed the "Lessee," for a definite period, varying from 4 to 10 years, certain rolling stock enumerated in the lease.

2. The Railroad Company agrees to pay certain annual payments

of money, equal in number to the years of the continuance of the contract, with semi-annual interest upon the deferred payments.

3. The payments so to be made are the agreed value of the rolling stock, and upon the completion of such payments the rolling stock becomes the absolute property of the Railroad Company for merely nominal consideration.

4. Upon the receipt of the rolling stock the Railroad Company delivers to the so-called lessor, or to a trustee, designated for
106 the purpose, its equipment bonds, with coupons attached, the face of the bonds of equal amount with the agreed price, and the coupons of equal amount with the agreed interest, and both payable at the agreed times.

5. These bonds are negotiable and the holders of the same are by the contract made, with the "lessor," a company (not a corporation), called a "Car Trust," with a designation as a "Series," there being as many "Series" as there are separate "Equipment Leases" and deliveries of rolling stock and bonds reciprocally. This organization of "Car Trusts" is a device to enable the holders of the bonds by purchase, to act together, through the trustee, for the purpose of enforcing the contract, and of becoming the owners of whatever interest the original lessors may have retained in the rolling stock under the contract.

6. The contracts contain a defeasance clause by virtue of which upon failure of the Railroad Company to make payment of principal or interest as the same becomes due, the "Car Trust" has the right to enter upon the railroad, take possession of the rolling stock, sell same at public auction, and apply the proceeds to the payments due and to become due, the balance, if any, to be paid to the Railroad Company.

7. The railroad company agrees to keep the rolling stock in repair, and, at the end of the term, to have it in as good condition as when received, "reasonable wear and tear alone excepted," and to make good losses by destruction, by substituting for the destroyed cars or engines other of similar and equally valuable construction. The name of the car trust and series is to be painted upon each car and engine.

The master finds said contracts to be in fact and in law conditional sales of said rolling stock, in which the seller intends to retain a lien upon the property as security for the purchase-money, and the purchaser has a valuable equity of redemption, increasing in worth as the several stipulated payments may successively be made.

He further finds that the rolling stock described in the several leases was delivered to and accepted by the proper officers of the Toledo, Delphos and Burlington Railroad Company, and of the Toledo, Cincinnati & St. Louis Railroad Company, respectively, saving and reserving the questions raised, as hereinbefore noted,
107 respecting part of the rolling stock upon the Dayton and South

Eastern Division in Boston Car Trust Series, and part of that upon the original Toledo, Delphos and Burlington Railroad in the car trust known as the Clark Post & Martin Contract.

He further finds that said "Equipment leases" were filed in the office of the Secretary of State of Ohio, in accordance with the terms of the Statute of Ohio, entitled, An Act Supplementary to Section 3,378, of the Revised Statutes of Ohio, passed March 16, 1882.

Much testimony was taken by the parties, tending to show that portions of the rolling stock delivered under the several car trusts were unfit for use upon this road, and, upon the other hand, that the road itself was in such bad condition as to be ruinously destructive to the rolling stock.

The master finds that the criticisms made by expert witnesses upon the rolling stock are, in the main, directed to matters which were defined by the specifications and patterns furnished by the company, and show a difference of opinion on the part of the witnesses produced from the master mechanics in the former employ of the company, who furnished the specifications. The balance of testimony seems to show, and the master so finds, that the rolling stock was reasonably built for the purposes intended, and was accepted by the officers of the company in good faith and without fraud or collusion.

The master finds that the condition of the railroad was that which is incident to a new narrow gauge railroad, and that the officers and managers of the company, prior to the receivership, endeavored, in good faith, to complete the same in a reasonable manner, and that its condition was within the knowledge (or the easy means of obtaining the knowledge) on the part of the makers and vendors of the rolling stocks.

The master finds that the receiver has, in fact, used the income from the road in its operation and maintenance, keeping it in as good condition as the means at his disposal would permit; and that, while portions of it need the expenditure of considerable amounts of money to put it in first-class condition, it is, in general, in a reasonable condition for use, its newness, general character and incomplete condition when it passed into the hands of the receiver being taken into account and fairly considered.

108 The master therefore further finds that neither the condition of the road, nor that of the rolling stock, so far varies the position of either party to these contracts from that which should have been reasonably contemplated by them at the making of the same, as to make it necessary or just to depart from the provisions of the agreements themselves in stating an account between them for the time prior to the receivership.

It was claimed before the master on behalf of the Grant Locomotive Works (intervening petitioners) that the demand alleged to be made by them for the immediate return of certain locomotives in Massachusetts Car Trust Series C. & F., made the refusal of the re-

ceiver to surrender them a conversion on which they have the right to recover from the receiver (and out of the proceeds of the sale of the road) the full value of such locomotives at the time of such alleged conversion.

The master finds that the nature of the contracts referred to above, the equity of the redemption on the part of the vendee, the rights of holders of the equipment bonds issued under such contracts, and the interests of mortgagees of the railroad and general creditors in the subject matter of such contracts, all make the intervention of the court as a court of equity a necessity to determine the rights and to marshal and enforce the liens of parties, and that the possession of the rest by the receiver as the officer of the court, *pendente lite*, is neither a conversion nor an unlawful withholding of possession. He is therefore unable to report in regard to said locomotives any other or different rule of damages from that herein applied to the other rolling stock included in said car trusts.

In the hearing before the master it was asserted by counsel for mortgagees of the portions of the road to be sold on the 28th inst. that such mortgagees contemplate (if they shall become purchasers) changing the gauge of such divisions to the standard gauge. Such a purpose or the possibility of such a purpose makes it proper for the master to give to the court his conclusions from testimony given before him, which might otherwise be irrelevant.

He finds that the specifications and dimensions of the greater part of the freight cars furnished to the railroad under the several car trusts, were such as to make those cars nearly as heavy and nearly as large as the average freight equipment actually in use upon standard gauge roads, and that this increase of size was by several of the witnesses made a basis of complaint against this class of rolling stock. He further finds that should said road or divisions of it be changed to a standard gauge, a change of the trucks of these cars can be made without losing all of the material in them, so as to adapt them to a standard gauge road at a cost of about $—— per car, and that such cars, when so changed, would probably be more efficient and useful for light traffic on such a standard gauge road than upon the narrow gauge.

109

He finds that the opinion of railway experts tends to regard narrow gauge railroads as unable to compete successfully with those of the standard gauge. That this opinion has become prevalent of late and that it affects the value of such roads and of the rolling stock adapted to them by lessening the demand for them in the market, making a difference of thirty or forty per cent. in the probable selling price of rolling stock exclusively adapted to narrow gauge roads, less than that of similar construction and original cost adapted to standard gauge roads.

He finds that this discrediting of narrow-gauge roads came to a head about the time of the appointment of a receiver in these cases,

and that the embarrassment of the T., C. & St. L. Railroad Co. was an important factor in such discrediting, and in the consequent depreciation of the value in the market of such narrow-gauge rolling stock.

VI. *Rentals to be Charged to the Receiver.*

Applying the findings stated above to the situation of the parties at the beginning of the receivership, the master further finds that they resulted in nearly equal disadvantage to the owners of the rolling stock and to the receiver operating the road.

He finds that the former could not have found a market for this rolling stock if thrown upon the market as the consequence of the failure of this narrow-gauge system, and that the latter could not have found other similar rolling stock to take its place, if deprived of it.

He finds, therefore, that the property being in the hands of the court, it is equitable and fair that pending the final disposition of the causes neither party should take advantage of the supposed necessity of the other, but that justice will be done if the rental during the receivership be fixed at what would be ordinary renting price of engines and cars of similar cost upon standard gauge roads.

110 He finds further that it is now impracticable to ascertain the exact condition of each of the thousands of pieces of property constituting this rolling stock at the time the receiver entered into possession of it; but that it had already become "second-hand" property. He, therefore, finds that the receiver should take it as such property is taken on standard gauge roads when rented in accordance with usual custom, to be turned back to the owners at the end of the term, in what is understood by railway machinists to be good working order and condition, the age and ordinary wear and tear of the engines and cars considered, and that the receiver should not be chargeable with any other sum, whether as deterioration or depreciation, than such ordinary rentals and such cost of putting the rolling stock in good repair.

The master found the testimony on the subject of the value of such rentals very divergent. He accepted as a general basis of his conclusions the testimony of Mr. Heguisch, President of the U. S. Rolling Stock Co., who, though representing a party in interest, seems to give candidly the result of the largest experience in the actual renting of standard gauge rolling stock; it being evident from causes already reported, that there is no market price for rental of narrow-gauge equipment. The testimony will be found to be near the mean between the extremes given by others. It states that the maximum prices named by this witness are for exceptional kinds and sizes of cars or engines which would not be in ordinary demand, and that the lower prices are usually agreed upon when the rental is of very large lots of rolling stock at once.

The master finds that the following rates are a fair rental during the receivership of the rolling stock in question, viz.:

Locomotives	$160.00	per month.
Passenger coaches	50.00	" "
Baggage, express and caboose cars	25.00	" "
Box cars	8.00	" "
Stock cars	12.00	" "
Coal cars	7.00	" "
Gondolas	7.00	" "
Flat cars	6.00	" "

He further finds that an average sum of one thousand dollars per locomotive will be needed to put them in good repair and working condition. But such a sum should, in his opinion, be put at the command of the receivers, whether to expend upon the engines 111 according to their need or to pay to the owners of such engines as may be returned in varying sums according to the actual condition of such engine. Some of them are now undergoing repair, on others it is recently completed; still others need it greatly. The master gives the above average as a fair approximation and a basis for distributing to the portions of the road to be sold their just proportion of the receiver's liabilities.

He further finds that an average sum of twenty dollars per car will be needed to put the other rolling stock included in the Car Trusts in good repair and working condition. The distribution of this should obviously follow the same rule as that which has been stated in regard to the locomotives.

Testimony was offered tending to show that the contract with the Grant Locomotive Works for ten locomotives in Mass. Car Trust Series F., though nominally made with the Cincinnati Northern Railway Company, was negotiated by the officers of the T., C. & St. L. Railroad Co. just prior to the consolidation of the former into the latter, and with the mutual understanding that the locomotives were procured for the general use of the latter company. Some legal question as to the effect of an Illinois statute being made a ground for preferring this form of action. The master finds the fact to be in accordance with this statement and that such locomotives were never the property of the Cincinnati Northern Railway Company, nor intended for use on that road specially.

The master has been asked by counsel to report the value of rolling stock upon two other bases of time, viz: for the six months preceding the receivership, and for the three months between August 1 and November 1, 1883.

From the evidence before him, the master does not think any material variation in the monthly rates which he has above reported should be made for either of said periods. If such rentals were to be made a part of the cost of operating the road for the six months

from Feb. 1st to August 1, 1883, he would report the monthly rates already given as fair ones. As to the period from August 1st to November 1st, 1883, if the rentals for that period were to be deducted from receiver's indebtedness, as counsel for some of the bondholders claimed, the master finds that it would only be proper and necessary to reduce the amount of the rental reported, proportionately to the time, the rate per month remaining the same.

112 VII. *Proportionate distribution of receiver's indebtedness as among the divisions of the road.*

Before stating an account under the finds above made, another general question requires to be discussed, viz.: How shall the rentals of rolling stock, &c., be distributed to the several constituent roads which make up the system and which are to be sold separately?

In pursuance of the orders of the court, the receiver has for some months kept the operating expenses of the road separately distributed to the several divisions, as such expenses were incurred. In doing this he kept separate account of all expenses which were properly local, under the customary rules of railroad accounting; and the general expenses which could not be treated as local, he divided upon a scale of percentage based chiefly upon the miles in length of the several parts of the road, but modified by the extra value of the property and the earning capacity of the terminals of the line at Toledo and at Cincinnati. On recommendation of the receiver, the court has authorized the allowance of an extra share of the earnings (known as an "arbitrary" among railway accountants) to these terminals, and in the distribution of general expenses, the receiver added to the proportion of these terminals on a mileage basis, an addition proportionate to this "arbitrary." The master finds that this division by the receiver is a fair one and that it would be impracticable to change his account by altering it.

If the operating expenses of the six months prior to the receivership should be adjudged and decreed by the court to be a preferred debt, the master would find that the proportions already fixed by the receiver would be the proper and just proportions for the distribution of all of the same except the car rentals.

For such car rentals, whether for the period of the receivership or any other that may need to be determined, the master finds and reports that in his judgment the fair rule of distributing it is in the proportion of the miles actually run by cars, &c., on the several divisions, as this represents more accurately than any other rule, the earnings with which such divisions are credited.

A careful compuation of such car mileage made by the accounting officers of the receiver, and which the master finds to be accurate as based upon the actual performance of cars from Nov. 1, 1883,
113 to May 1, 1884, gives the following percentages for distribution of car rentals:

Toledo Terminal,	4-10 of 1 per cent	0.40
Toledo Division,	23.79 " 1 "	23.79
Dayton Division,	12.98 " 1 "	12.98
D. & S. E. Division,	32.67 " 1 "	32.67
Iron Railroad,	1.98 " 1 "	1.98
Cincinnati Division,	1.36 " 1 "	1.36
Cincinnati Northern,	4.16 " 1 "	4.16
St. Louis,	22.66 " 1 "	22.66
Total		100.00

The master does not find it necessary to state the rentals separately on the different car trusts for the present purpose of this report. Some cars have been destroyed, and a specific settlement with each claimant can be hereafter stated. The present purpose, viz.: to show the amount which purchasers of the road may have to raise, is more clearly met by keeping the figures in gross, subject to a minute inquiry as to each car trust in a subsequent report, after the principles shall be settled by the court.

The following table exhibits the items of rolling stock held under the several car trusts and the rental of the same from Aug. 1, 1883, to July 1, 1884, at the rates reported by the master above; the time being eleven months:

KIND.	RATE.	NO.	AMOUNT.
Locomotives	160	68	119,680.00
Coaches and combination cars	50	43	23,650.00
Baggage and caboose	25	22	6,050.00
Stock cars	12	183	24,156.00
Box cars	8	1,171	103,048.00
Coal cars	7	1,263	97,251.00
Flat cars	6	457	30,162.00
Total			403,997.00

The master would further report that the distribution of these rentals and estimate for final repairs during the receivership to the several divisions upon the percentages above stated, will charge to each the sum stated in the following table, to-wit:

114 DIVISION.	PER CENT.	AMOUNT.
Toledo Terminal	0.40	1,616.00
Toledo Division	23.79	96,110.88
Dayton Division	12.98	52,438.81
D. & S. E. Division	32.67	131,985.82
Iron Railroad Division	1.98	7,999.14
Cincinnati Division	1.36	5,494.36
Cincinnati Northern Division	4.16	16,806.27
St. Louis Division	22.66	91,545.72
Total	100.00	403,997.00

The Iron Railroad is included in the above distribution of rentals, because, having a third rail for use of narrow-gauge cars and engines, all the "through" business was done in narrow-gauge rolling stock and part of the "local." The mileage, therefore, was made up in part on that road, and the master finds that it is right that it should bear its proportion of the rental.

The estimate for final repairs, amounting to the sum of,

for locomotives	$68,000.00
for cars	63,000.00
Total	$131,000.00

should be distributed upon the same percentages as the rentals, to-wit:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	0.40	
Toledo Division	23.79	
Dayton Division	12.98	
D. & S. E. Division	32.67	
Iron Railroad Division	1.98	
Cincinnati Division	1.36	
Cincinnati Northern Division	4.16	
St. Louis Division	22.66	
	100.00	$131,000.00

Back taxes, which have remained unpaid, are necessarily a preferred debt, and are liens upon the several divisions in the counties through which they run. They can therefore be distinctly charged to these several divisions. The master has not as yet received
115 the evidence of the amounts due in Indiana and Illinois, and can only state in this report, the amounts which he finds due upon the several divisions in Ohio, ordered to be sold, viz:

Dayton Division, about	$6,500.00
South Eastern Division, about	7,500.00
Iron Railroad, about	6,000.00
Cincinnati Division, about	1,000.00
Cincinnati Northern Ry., about	6,500.00
Total	$275,000.00

The amount can only be stated approximately, since the accurate divisions would require an analysis of county auditor's books, which there has been no opportunity to make. The above estimate does not include the taxes due in June, 1884, nor penalties for delayed payments. The June taxes of the current year would probably add similar sums to the indebtedness, practically doubling the amount.

The division of the amount paid by the receiver upon corporation

debts, in excess of his receipts from corporation assets, the master finds should be done upon the basis of the relative expenses of the several roads, as that amount (in the impossibility of tracing its items) is presumably made up by the aggregate expenses of the divisions of the roads in the usual proportions. It included payrolls in part, and these were due upon the Iron Road as well as the others. The master therefore states the distribution of this payment of $58,915.62 (see page 27), in the proportion of the ordinary expenses of said divisions (exclusive of car rentals), as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.63	960.32
Toledo Division	26.81	15,795.28
Dayton Division	10.87	6,404.13
D. & S. E. Division	24.08	14,186.88
Iron Railroad	2.32	1,366.84
Cincinnati Division	1.76	1,036.92
Cincinnati Northern Railway	10.00	5,891.56
St. Louis Division	22.53	13,273.69
Total	100.00	58,915.62

The estimated deficit in the receiver's earnings for April, May and June of $100,000, being based upon separate accounts kept, 116 and the exact application of each division's earnings to its own expenses, the master finds should be divided in the proportion of the deficits, which have already accrued since that mode of accounting was adopted, under the order of the court. In this case the Iron Road will have a probable surplus, which the receiver will have to return to it, and it does not therefore appear in this list of deficits:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.58	1,580.00
Toledo Division	30.05	30,050.00
Dayton Division	7.36	7,360.00
D. & S. E. Division	18.70	18,700.00
Cincinnati Division	2.25	2,250.00
Cincinnati Northern Division	10.21	10,210.00
St. Louis Division	29.85	29,850.00
Total	100.00	100,000.00

During the first three months of the receivership, and before the separate keeping of accounts of the divisions was completely in operation, there was a deficit of $26,583.21 upon the divisions, excluding the Iron Railroad and the Cincinnati Northern (see p. –). This has to be divided among the divisions on which it accrued, and the master finds that it should be in the proportion of their ordinary expense to each other, on the same principle as was adopted in re-

gard to the division of $58,915.62 above, but reducing the number of parties among whom it is divided as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal Division	1.85	491.79
Toledo Division	30.58	8,129.15
Dayton Division	12.40	3,296.32
D. & S. E. Division	27.46	7,299.75
Cincinnati Division	2.01	534.32
St. Louis Division	24.70	6,831.88
Total	100.00	26,583.21

117 SUMMARY OF DIVISION OF RECEIVER'S DEBTS.

From foregoing statements, the amounts each division must furnish to meet the receiver's liabilities, rentals, and taxes, (the latter being doubled) is as follows:

Toledo Terminal	$7,907.90
Toledo Division	254,670.35
Dayton Division	97,721.86
D. & S. E. Division	225,806.24
Iron Railroad	21,365.98
Cincinnati Division	15,967.62
Cincinnati Northern Railway	70,361.06
St. Louis Division	203,183.79
Total	$896,984.80

To the above must be added the repairs on rolling stock, p. 53a. Indebtedness for operating expenses during six months prior to the receivership, excluding car rentals:

The master finds the total amount of these as reported above to be — from p. 28	$274,908.08
Indebtedness to foreign roads, p. 29	6,366.47
Cincinnati Northern Railway, p. —	5,084.97
Total	$286,359.52

He finds that this is made up of the expenses of all the roads, and that the only practicable way of dividing them is upon the table of percentages presented on p. 55.

If the court shall order said sums to be paid out of the proceeds of the road, each division will have to furnish a sum additional to those last above reported, as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.63	4,667.66
Toledo Division	26.81	76,772.99

Dayton Division	10.87	31,127.28
D. & S. E. Division	24.08	68,955.37
Iron Railroad Division	2.32	6,643.54
Cincinnati Division	1.76	5,039.93
Cincinnati Northern Railway	10.00	28,635.95
St. Louis Division	22.53	64,516.80
Total	100.00	$286,359.52

118 This is exclusive of the amounts of receiver's certificates issued in Illinois for indebtedness of the St. Louis Division under order of court, and of the certificates issued for rights of way on Cincinnati Northern Railway. The latter are secured as hereinbefore reported and the former are an extra indebtedness against the St. Louis Division.

If the court should order car rentals on the cars included in the car trusts to be paid for six months before the receivership, a single computation on the basis already given will fix the proportions as follows, to-wit:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	0.40	881.46
Toledo Division	23.79	52,424.11
Dayton Division	12.98	28,602.97
D. & S. E. Division	32.67	71,992.26
Iron Railroad Division	1.98	4,363.93
Cincinnati Division	1.36	2,996.93
Cincinnati Northern Division	4.16	9,167.06
St. Louis Division	22.66	49,954.04
Total	100.00	220,362.00

The above is a division at the rate for the rolling stock per month, and the same proportions as to the divisions of the roads as is given on p. 53 above.

He will only add that the reason for including the Cincinnati Northern Railway in the distribution of the indebtedness prior to the receivership is that the indebtedness of that company to the T., C. & St. L. Co., at the time of the consolidation, if fully equal to the share thus assigned that division and as such indebtedness as between those companies was cancelled by the consideration, the distribution as affecting general creditors should be made as stated.

All of which is respectfully submitted,

J. D. Cox,
Special Master.

Cincinnati, 26th June, 1884.

119 *Master's Fees.*

Days occupied in taking testimony .	22	
Do. in making up report, and in correspondence with numerous claimants	18	
	40	—$30.00—$1,200.00

Witness' fees taxes on the file of testimony.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the original preliminary report of special master, filed in the clerk's office of said court on the 26th day of June, A.D. 1884, in the causes entitled, Central Trust Co., of New York, *vs.* Toledo, Cincinnati & St. Louis Railroad Co., *et al.*, which causes are numbered 3,554–77–78–79, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, Ohio, this 26th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*

By ——— ——— *Deputy Clerk.*

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120 **"G." 2.**

UNITED STATES OF AMERICA,
DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that on the 17th day of July, 1884, Jacob D. Cox, Special Master in Chancery, filed in said court his preliminary report in the cause of the Central Trust Company of New York, *vs.* The Toledo, Delphos & Burlington Railroad Company, *et al.*, No. 7,706. And I do hereby further certify that on the 12th day of January, 1887, said Jacob D. Cox, Special Master in Chancery, filed in said court his final report in the cause of the Central Trust Company of New York, *vs.* The Toledo, Delphos and Burlington Railroad Company, *et al.*, No. 7,706.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

121 **"H." 2.**

I, Irvin Belford, Clerk of the Circuit Court of the United States, for the Northern District of Ohio, do hereby certify that I have examined the record in the cases of Central Trust Co. *vs.* Toledo, Delphos & Burlington R. R. Co., *et al.*, and find no exceptions to Master Cox's report in favor of the Iron Railroad claim have been filed in this court. The only reports of J. D. Cox filed in this court were his second and final report in case of Central Trust Co. *vs.* Toledo, Cincinnati & St. Louis R. R. Co., No. 380, filed Jan. 18, 1887.

Witness my official signature and the seal of said court this 19th day of November, A.D. 1891. IRVIN BELFORD, *Clerk.*

By MOLLIE W. BROWN, *Deputy Clerk.*

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122 **"K." 2.**

~~Circuit Court of the United States~~
~~THE UNITED STATES OF AMERICA,~~
SOUTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

The Central Trust Co., of New York,
vs.
The Toledo, Cincinnati & St. Louis R. R. Co., *et al.*,
Cases 2,554, 3,576, 3,577, 3,578, 3,579.

SECOND REPORT OF J. D. COX, SPECIAL MASTER.

Uncontested indebtedness of the receiver.

The court having directed the master to make further analysis of the receiver's indebtedness, so as to show just what portion of the same are uncontested, and the proportionate parts of the same, which, upon the ratios before reported, should be borne by the several divisions of the T., C. & St. L. Railroad, the master would respectfully report further.

That by undisputed indebtedness of the receiver, he understood indebtedness for the operation of the road which is settled both as to the fact of liability and the amount thereof, so that no difference of claim between the receiver and his creditors exists in regard thereto, and no exception has been taken by the mortgagees or other parties to these suits.

This undisputed indebtedness may be separated from the items heretofore reported by the master, and is as follows:

123 1. Indebtedness of the several divisions by reason of excess of expenditures over income, based upon the table on page 26 of my former report, (printed page 16).

DIVISIONS.	AMOUNTS.
Toledo Terminal, Nov. 1, '83, to April 1, '83	3,259.79
Toledo Division, " "	62,085.04
St. Louis Division, " "	61,682.50
Dayton Division, " "	15,222.60
Dayton & S. E., " "	38,633.79
Cincinnati Division, " "	4,652.02
Cincinnati Northern Div., Aug. 1, '83	24,453.23
Total	209,988.97

The above items are the same as before reported, except that of the Toledo Division, which is less by the sum of $42,500, this amount not being for supplies and pay rolls, but a special indebtedness of that division alone, and a specific lien upon it, for which, as the master is informed, certificates of the receiver have been issued by order of court, and which does not come within the class of debts the master is now separating from.

2. Deficit in receiver's operating receipts for April, May and June, 1884, as reported in former report, page 56 (printed page 34), $100,000, divided upon the per centages there stated, viz:

DIVISIONS.	PER CENT.	AMOUNTS.
Toledo Terminal	1.58	1,580.00
Toledo Division	30.05	30,050.00
Dayton Division	7.36	7,360.00
D. & S. E. Division	18.70	18,700.00
Cincinnati Division	2.25	2,250.00
Cincinnati Northern	10.21	10,210.00
St. Louis Division	29.85	29,850.00
Total	100.00	100,000.00

3. Deficit in receiver's operating receipts for the period from Aug. 1, '83, to Nov. 1, '83, when separate accounts were not kept. The Cincinnati Northern Railway is excepted, its deficit for that period being included in table 1, above—then deficits are divided upon the same percentage as he has already reported in former report, page 56 (printed page 34), $26,583.21, as follows:

124 DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.85	491.79
Toledo Division	30.58	8,129.15
Dayton Division	12.40	3,296.32
D. & S. E. Division	27.46	7,299.75
Cincinnati Division	2.01	534.32
St. Louis Division	25.70	6,831.88
Total	100.00	26,583.21

4. Amounts already expended by the receiver in paying, under order of court, corporation debts of the T., C. & St. L. in excess of receipts from corporation assets, as reported in former report, page 55 (printed page 33), $58,915.62, divided as reported in said report:

DIVISIONS.	PER CENT.	AMOUNTS.
Toledo Terminal	1.63	960.32
Toledo Division	26.81	15,795.28
Dayton Division	10.87	6,404.13
D. & S. E. Division	24.08	14,186.88
Cincinnati Division	1.76	1,036.92
Cincinnati Northern Railway	10.00	5,891.56
St. Louis Division	22.53	13,273.69
Iron Railroad	2.32	1,366.84
Total	100.00	58,915.62

5. Taxes.— The master has been unable as yet to procure any more definite statement of the taxes due in the several counties through which the roads run, than was presented in his former report.

Summary of the foregoing.

Bringing together the four classes of items above enumerated and tabulating them, we shall have the total amounts of this undisputed indebtedness, and the amount to be contributed by each division of the road.

The sum of $33,716.37 before reported to be due to the Iron Railroad from the other divisions is included in their deficits, and is part of the undisputed indebtedness of the receiver, subject, however, to be reduced by the proportion of car rentals, etc., charged that road, if the same shall be approved by the court as reported in the former report of the master. The amount of $1,366.84 charged the Iron Railroad in table 4 above as its part of corporation debts paid by receiver will be also off-set against its credit in this manner:

125 Divisions.	Table 1.	Table 4.	Table 2.	Table 3.	Totals.
Toledo Terminal	$3,259.79	$960.32	1,580.00	491.79	6,291.90
Toledo Division	62,085.04	15,795.28	30,050.00	8,129.15	116,059.47
St. Louis Division	61,682.50	13,273.69	29,850.00	6,831.88	111,638.07
Dayton Division	15,222.60	6,404.13	7,360.00	3,296.32	32,283.05
D. & S. E. Division . . .	38,633.79	14,186.88	18,700.00	7,299.75	78,820.42
Cincinnati Division . . .	4,652.02	1,036.92	2,250.00	534.32	84,733.26
Cincinnati Northern Railway . .	24,453.23	5,891.56	10,210.00		40,554.79
Iron Railroad		1,366.84			1,366.84
Totals	209,988.97	58,915.62	100,000.00	26,583.21	395,487.80

Same,
vs.
The Toledo, Delphos & Burlington Railroad Company. } *Nos. 3,576–77–78.*

Same,
vs.
The T., D. & B. R. R. Co., The Iron R. R. Co., *et al.* } *No. 3,579.*

THIRD AND FINAL REPORT OF SPECIAL MASTER.

The first or preliminary report of the undersigned as special master, was filed June 26th, 1884, and was printed by order of the court.

At the same term the court desired immediate information on certain questions, and by its direction the master made a second report which was filed July 26, 1884. This report showed what portions of the receiver's indebtedness were uncontested, and the proportionate parts of the same, which, upon ratios before reported, should be borne by the several divisions of the T., C. & St. L. Railroad. The report included tables of deficits in receipts by the receivers, as compared with operating expenses, distributed to
130 the several divisions of the railroad upon the percentages before reported, and included a separate table of those for the period from August 1st, 1883, to November 1st of that year, known as the Dwight Receivership.

Said second report also included the subject of counsel fees, and fees of master's sales in Ohio, and the claim of the Central Trust Co. for trust services.

At said term decrees were entered, determining certain matters at issue, but all questions not specifically adjudged were declared in terms to be open for further hearing before the master as fully as if no report had been made.

Since that time the master has held himself in readiness at all times to take testimony and hear arguments on all the open points originally referred to him, and those subsequently and specifically referred. In regard to some of these, counsel desired to await efforts which have been understood to be in progress to reach a common understanding and ruling in the Sixth and Seventh Circuits, and this with the other delays incident to business in which numerous counsel scattered in all parts of the country are engaged, has prolonged the master's work, despite his earnest efforts to bring it to a close.

Meanwhile, references of certain matters and questions have been made in both circuits to other masters (Messrs. Fishback and Ricks), and the undersigned has endeavored to confine himself

strictly to the unfinished matters already in progress before him. These may be enumerated as follows, to-wit:

1. Certain disputed claims against the T., C. & St. L. R. R., or some of its divisions.

By "disputed claims" is here meant claims for labor, supplies or damages, which the proper officers of the Railroad Company had refused to acknowledge, enter in their books, or make the usual vouchers for; and acting under the instructions of the court, and the common agreement of counsel, the master has taken cognizance of such claims, when presented, whether the claimants had formally intervened by petition or not. The number of such claimants appearing before him has not been large.

2. Further investigation of specific liens on portions of the road, whether by way of mortgage, judgment, mechanics' lien, incompleteness of rights of way, or otherwise.

131 3. Questions relating to the Iron Railroad, the "third rail" upon the same, the apportionment of earnings and expenses in the receiver's accounts with it, and its extent of claim against the other divisions in consequence.

4. A claim of the mortgagees and purchasers of the Dayton & South Eastern Division, that that division should be credited with a sum for the transportation of coal to the northern and western divisions, or to all the other divisions except the Iron R. R., no such allowance having been made by the receivers under the orders of court.

5. Claims of counsel for fees specially referred by the court.

6. The accounts between the Delphos Trust (so-called) and the T., C. & St. L. R. R. Co., including the title to certain small branches in Jackson County, Ohio.

7. The so-called Ballou Car Trust, on Dayton & S. E. Div.

8. Claim of Cincinnati, Hamilton & Dayton R. R. Co., for rental of track rights, &c., in Dayton.

Taking these several items up in their order, the master would respectfully report as follows:

1. Disputed claims which have been presented before the master.

a. Claim of Pettibone & Mulligan of Chicago, Illinois.

This claim is not disputed as to its amount or its general validity, but as to its claim for priority.

The master finds the facts to be as follows: The T., C. & St. L. Railroad Company, by its proper agents, bought of Pettibone & Mulligan railroad supplies of the kinds used in operating and repairing railways. Such purchases were nearly all made prior to 1st of February, 1883, and these were settled for by notes given in April, 1883, amounting in principal to $6,561.58.

Between 1st February and 1st August, 1883, Pettibone & Mulli-

126 The total amount of the undisputed indebtedness of the receiver now reported is therefore $395,487.80, and the sums to be contributed thereto by the several divisions are those set opposite their names in the last column of the above.

Corporation of Counsel for the Trust Company, Complainant.

Proof was made before the master that Messrs. Butler, Stillman & Hubbard, of New York, and Hoadly, Johnson & Coalston, of Cincinnati, come employed by the Central Trust Co., of New York, complainant, as counsel in these cases.

The master finds that the former firm has made cash expenditure to the amount of $1,172.50 in traveling expenses in journeys to Chicago, Indianapolis, Toledo, Cincinnati, &c., in prosecuting the business of these cases, and the latter firm has made similar cash expenditure of $342.86 in the same business, part thereof being the expenses of expert witnesses called to examine the condition of locomotives, &c.

Messrs. Colston, Foraker & Ransey testified as to the value of professional services of the complainant's counsel, which services have no doubt been arduous and very continuous for about a year, including several arguments before the courts and the protracted hearing before the master. Mr. Colston testified to a partial agreement, practically amounting to an understanding with the bondholders upon the division sold, to the effect that $5,000.00 upon each of said divisions should be the compensation of counsel, besides their cash expenses. Said sum to be divided equally between said two firms acting as such counsel. The other witnesses testified that such compensation is reasonable in view of the services rendered and labor performed.

This being the whole testimony offered on the subject, the master finds in accordance therewith that said sum of $5,000.00 for each of the divisions sold, is a reasonable compensation for counsel, to be divided in the manner above stated, and that the cash expenditures of said counsel shall be repaid them, dividing the same among the divisions as the counsel for are divided. The master is informed that the Iron Railroad has settled with counsel, so that the sum found due from it for fees, etc., need not be made the subject of an order.

127 *Fees of the Master Commissioners who made the sale.*

The special master has been left to the custom of the court, as appears from its record, for the means of reporting what fees should be paid the master commissioners who made the sales. Four divisions have been sold, and the labor and responsibility for preparing advertisements, making the sale, preparing deeds, &c., is about the same in each. The special master would report that he finds that the sum of $250.00 in each of said four sales, would, in his

judgment, be a reasonable fee to the master commissioners making such sales and conveyances.

Claim is made by the Central Trust Company, of New York, complainant, for compensation to itself for care and labor in these cases, and evidence is offered that $5,000.00 would be a reasonable sum for the same. The master does not feel that he has information to enable him to report on this claim. It is understood that the Trust Company has received considerable sums of money at the rate of $1.00 for each bond of $1,000.00 issued by the several Railroad Companies under the mortgages, and the master is not advised how far this was received and intended as confirmation for such services in the beginning of suits by such Trust Company. The counsel fees of the Trust Company have been reported.

All of which is respectfully submitted.

J. D. Cox,
Special Master.

128 The United States of America, }
Southern District of Ohio, } ss.
Western Division. }

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the original Second Report of Special Master's Uncontested Indebtedness of Receiver, &c., filed in the clerk's office of said court, on the 26th day of July, A.D. 1884, in the causes entitled the Central Trust Company of New York, *vs.* The T., C. & St. L. Railroad Company, *et al.*, which causes are numbered 3,554, 3,576, 3,577, 3,578, and 3,597.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, Ohio, this 19th day of December, A.D. 1891. B. R. Cowen, *Clerk.*

By Janie M. F. Cowen, *Deputy Clerk.*

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129 **"Q." 2.**

In the Circuit Court of the United States, Southern District of Ohio, Western Division.

The Central Trust Company of New York,
vs.
The Toledo, Cincinnati & St. Louis R. R. Co. } *No. 3,554.*

gan sold other similar goods to the railroad company, amounting to the sum of $868.24.

132 As the road went into the hands of Dwight, receiver, on 1st August, 1883, the last-named sum ($868.24) is an undisputed account against the company, which unquestionably accrued within six months next before the beginning of the receivership, and the master finds and reports that the indebtedness to that extent was of a kind properly incidental to the operation of the road and should be classed as debt incurred in such operation.

The notes for the larger sum above named ($6,561.58) were given within six months before the receivership, but the original indebtedness was made and the goods furnished more than six months before the receivership. In the classification of the debts which the master has heretofore made, and as the same are exhibited in all the schedules accompanying his first report, the master has treated the time of the original accruing of any indebtedness and not the time of the giving or renewal of notes by the company as criterion of priority and date of such debts for the purpose of determining whether they accrued within or before the six months period preceding the receivership, and he now formally reports this to be the rule of law, as he finds it, in regard to all such debts.

Prima facie therefore the notes given Pettibone & Mulligan for said sum of $6,561.58 represent a part of the indebtedness of the Railroad Co. accrued more than six months before the receivership.

The claimants, however, insist that the facts take the case out from under the rule, and form an exception to it.

As to the facts upon which such an exception is claimed, the master finds them to be substantially as set forth in the testimony of Mr. Pettibone, which was not contradicted, to-wit: On March 27, 1883, the claimants, being urgent for payment of the debt due them on account, Mr. Willard White, Vice-President of the Railroad Company, called upon them and asked an extension of time, on the ground that to complete the road to St. Louis was calling for more money than they could easily raise; that a subscription of $800,000.00 had been raised among friends of the road at the East, and that this would enable them to complete the road, and pay its floating debt within a short time, aided as they would be by increased earnings when the road should be opened to St. Louis, as they thought it would be by 15th April. On these representations the claimants consented

133 to take notes at four months and longer times, and did so. None of these notes had fallen due, or been paid when the receiver was appointed. Nothing has been paid upon them, and the testimony shows that they are still held and owned by the claimants.

The master finds that the representations made to Pettibone & Mulligan by Mr. White, Vice-President of the road, were so far true that a subscription for a large amount, approximating the sum named, had in fact been made with the purpose and object declared,

and the evidence on the subject is entirely consistent with good faith on the part of the officers of the road in the intention and expectation of applying the proceeds of such subscription as was represented by Mr. White. How far the subscription was actually paid in is not entirely clear from the testimony; but the master finds that payment was interrupted by the proceedings in these cases. The question of the collectibility of such subscription has not been referred or submitted to the master, and he can only assume from the testimony before him, that, for whatever it was worth, the subscription was assets in the hands of the receiver.

The master is, however, unable to find that the proceeds of such subscription are subject to any specific lien in favor of Pettibone & Mulligan. The subscription was declared to be made for the purpose of completing the road and paying the floating debt, and it was implied that the completion of the road would come first, so as to increase its earning capacity. In this view the notes were given postponing payment to a time beyond the expected completion of the road. The unused part of the subscription, as assets, in the receiver's hands, would, if collected, be by law applied in the manner originally intended. There seems to have been no agreement or intention that Pettibone & Mulligan should stand in better relation to such assets than other creditors in the floating debt list. The bankruptcy of the road, and the accumulation of receiver's debts have made it impossible to pay any floating debt of the company out of the assets, except as such debt may be declared a lien on the road, to be paid out of purchase money under the so-called "six months' rule." The decision as to this rule having been reserved by the court, and not referred to the master, no other report can be made by him than the foregoing, fixing the place of this indebtedness in the order of time, so that it may be easy to apply to it such rule as to priority as the court may adopt.

b. Claim of C. R. Brown, for rental of lots and side track in Avondale, Cincinnati.

134 Mr. Brown's claim is as follows: That, being the lessee of a village lot of land in said Avondale, near what is known as the Avondale Junction of the Cincinnati Northern Division of the T., C. & St. L. Railroad, he made an oral agreement with the Cincinnati Northern R. R. Co. prior to its consolidation with the T., C. & St. L. Railroad by which a side track and switch was extended from the railroad upon his said lot, he (Brown) doing the grading and putting in a trestle, and the railroad company furnishing the iron, ties, &c., and laying them. That his business there was dealing in gravel and sand which was furnished to him by the R. R. Co. from pits along the line of their road at a stipulated price per car load. That from and after the appointment of a receiver of the consolidated road (August 1, 1883), the receiver took and had exclusive

possession of such side track on said Brown's lot, using it for the general traffic purposes of the road, and had continued such use and possession down to June 1, 1885. That no special agreement as to rent was made, though said Brown notified the receivers, through local agents, that they should not occupy the side track and lot without first agreeing with him for a definite rental of the same; that he is entitled to a reasonable rent of side track and land, which he claims is one hundred dollars a month or $2,200.00 in all.

Testimony was taken on both sides, and arguments heard as upon a separate issue, and the matter submitted.

The master finds the facts to be as follows:

Before the consolidation of the Cincinnati Northern R. R. with the T., C. & St. L., the former company put in the switch and side track upon Brown's lot as an accommodation for his intended business there and for mutual advantage, with the understanding that it might be used by the company for their local convenience and traffic, giving preference to Brown's business with them and not incommoding him. It was so used down to the appointment of a receiver, and no charge or credit was made either way.

Just before the property passed into the hands of the receiver, Brown discontinued his sand and gravel business at that point, apparently, as is indicated in the testimony, because the quality of the sand and gravel received from the Cincinnati Northern Line was unsatisfactory to him, though no breach of contract in that regard on the part of the company is made the basis of any claim, rent only being demanded.

135 The receiver continued to use the side track in substantially the same manner as the company had done, although the evidence is conflicting as the extent to which the use was carried. Mr. Brown, soon after his own business there was discontinued, began making objection to the use of the side track by the receiver for any purpose of standing, switching or unloading cars. These objections were made to the local agent and the exact form is not given, as they were oral, and not put in writing. The master finds from the testimony and so reports as matter of fact, that Brown did not ask or demand that the side track and switch be removed from his premises; on the other hand, the testimony shows that he desired them to remain, and endeavored to rent or let to shippers the right and easement of having cars consigned to them placed on that side track and unloaded on his premises. His claim for rent is estimated upon the use of the side track for such purposes, and not what would have been its value for other purposes if the track had been removed. He seems to have claimed that the track was exclusively his own, and that he had the right to forbid the railroad company or the receivers to use it at all without paying a rental to his satisfaction for so doing. The master finds as a matter of law, that the receivers appointed by this court, finding the side track in the use and occupation by the railroad com-

pany, went lawfully into possession of the same as officers of the court, as of all other parts and parcels of the road in regard to which rights of way might be unsettled or disputed. That such possession was the possession of the court, not as claimant to title, but as custodian of a disputed *res* or property. Upon final decree the title of contestants will be settled, and such relief as is equitable may be given to any who have been injured. The court and its receivers cannot be trespassers in holding, till judgment on the subject is entered, all the property found in the possession of the company whose affairs are being adjusted.

If the receivers are found occupying land of which the company was in possession, but to which the court shall find that it had no title, possession may be restored by decree to the proper owner, with reasonable compensation out of any profits for the use or with an accounting for rents and profits actually received. The master does not find that *ipso facto*, the possession by a receiver of a thing in dispute entitles him to whom it may finally be adjudged to compensation for its detention *pendente lite*, if there were no accruing profits from the thing during this detention. It is like money in the registry of the court which does not bear interest unless the court orders it invested.

136 Under these principles of law the first question to be determined will be what right had the railroad company in the "Brown side track" when the receiver found it in the company's use and possession.

Under the facts already reported, the master finds as matter of law that as a road and *quasi* public way, the Railroad Co. had been and was at the appointment of the receiver in peaceable possession of said side track by the oral license of Brown to lay their ties and rails upon a road bed and trestle which he had provided for them, and that in this easement the company was tenant at the will of said Brown; that to dispossess the company, Brown could give reasonable notice to take up and remove the ties, rails, &c., that under the arrangement by which the side track was built (above reported) Brown could not require and demand that said track should not be used for other business than his own, or to switch or store the company's other cars, whilst still claiming the right to keep the track and to make profit from it either by his own use or by renting it to others. His remedy was to end the tenancy altogether, and in the case of the receiver to make application to the court to have the property restored to him.

As the master has already reported as matter of fact that claimant Brown did not demand or intend to demand that the side track be removed, but only that it be closed to other use than his own, except upon paying to him compensation per car switched, or money rent in lieu thereof, he is obliged, under the principles before stated, to find further and report, as matter of law, that the claimant Brown had no legal right to such rental or compensation or to such forbid-

ding of the use of such track; his right was to the total and final termination of the license and tenancy as granted, to-wit: the use in any form for railway purposes of said trestle and embankment. This he neither demanded nor desired. The evidence makes it probable that the removal of the track could have been a great damage to the value present and expected of Brown's leasehold.

Evidence was introduced showing that in a few instances the agents of the receiver, at the special request of parties to whom freight was consigned, delivered such freight upon Brown's land. This was the case with a Mr. Soule, who, as is testified, directed some cars of lumber directed to him to be unloaded on the Brown lots. The receiver (Hafer) testifies that this was only done on the assertion of the consigner that he had Brown's permission for the unloading. It is in testimony that this had been done without
137 exception or protest of Mr. Brown prior to the receivership, and was continued in a few instances afterward. The lumber yard of Mr. Soule was opposite Mr. Brown's lot, and the lumber in the cases referred to was received from the cars by Soule and piled for a time on Brown's lot. If this was not authorized by the arrangement with the R. R. Company, Soule would be liable to Brown unless he was in fact authorized by Brown himself to store the lumber on the lot. In the mere delivery by the receiver upon the direction of the consignee, who averred that he acted by Brown's authority, there could at most be only a technical trespass, for which the damages would be nominal.

The master is, therefore, obliged to report, generally, that the claim of Mr. Brown against the receivers is not made out.

If, however, the court should be of opinion that the master is in error in this conclusion, the question of the measure and amount of damages would arise.

The estimate of the claimant is based on the amount he alleges he could rent the lots for, including a free privilege of the side track, for shipping and unloading freight there. His plan being to subdivide the lot and let to several tenants portions of it with privileges of railway side track as stated. The evidence does not show bona fide offers to rent at definite rates, even on this basis; but only negotiations on his (Brown) part looking to such an end. But the master finds no ground for the assertion on the part of Brown of such a right of subletting privileges in the side track. The receiver's possession must be either the same as that of the railroad company under the original agreement, or an exclusive occupation and custody *pendente lite*. If the former, Brown could claim no right of subletting. If the latter, the railway privileges were in no sense Mr. Brown's. If rental or compensation for occupancy of land be due Mr. Brown at all, it would be the general renting value of the land occupied. Brown had a lease of the land on which the side track was originally built in 1882 at a rental of $225 per annum for

five years. This was for 150 feet wide on Shillito street, and extending along the railroad. He subsequently negotiated with his lessors to enlarge the track to about 280 feet on Shillito street extending to Beach street. The evidence does not show that the track was extended upon the part of the lot last leased. The rental of the whole tract was $400 per annum.

If the court should determine that rental should be paid the claimant, the master would report that the rent agreed by Brown
138 with his lessor for the original tract, to-wit: $225 per annum, would be a just measure of damages, or $412.50 for the twenty-two months for which Mr. Brown claims.

c. Claim of Bronell & Co., machinists, at Dayton, Ohio.

This is a claim for a balance of account for rebuilding six locomotive engines burned in the destruction of the round house at Dayton, and for several other items of work, and labor, and materials. The total amount of Bronell & Co.'s bill was $19,061.43, and was an account against the receivers, chargeable under the system of accounts acted upon to the Dayton and Southeastern Division. Upon this account were credits to the amount of $8,390.10, leaving a balance due, as claimed, of $10,671.33.

Claimant Bronell testified that the prices of work and material were all at agreed rates, and are truthfully rendered, except that one item charged in his bill as $364.08, he testified to as $264.08. No conflicting testimony was given, the receiver demanding only proof of the account.

The master therefore finds that there was, at the date of Bronell's testimony, (July 25, 1884), due to Bronell & Co., from the receivers, the sum of ten thousand, five hundred and seventy-one 33–100 dollars. The Receiver, Craig, after the testimony was given, recognized the debt, and the master was informed that payment would be made without waiting for his report.

d. Claim of T. C. Spieden for expenses while engaged as special police officer in the employ of the company and the receivers.

The claimant was in the employ of the company and the receivers till January, 1885. He was paid a monthly salary, and no contest is made in regard to this. He also claims actual cash expenses of travel, hiring of buggy, meals and boarding when engaged away from home, in detective work, &c., by order of the officers of the company and receivers.

Claimant testified that his original contract was that these cash expenses should be paid, but, on various pretexts, payment was postponed, until the receivers were appointed; the same delays were afterward continued, and no part of the expense account has been paid, though the testimony is that itemized accounts were rendered.

No testimony in rebuttal of the claimant was offered.

139 The master finds on the evidence that the contract of having

provided for payment of actual cash expenses. That the total amount of such expenses was $690.00, and the salary of $60.00 for the month of July, 1883, which (like the rest of that month's payroll) remains unpaid. One year's expenses, amounting to $360.00, was incurred more than six months before the appointment of a receiver, six months' expenses, amounting to $180.00, and $60.00 salary are due for the period next before the receiver's appointment, and five months' expenses, or $150.00, is the debt of the receivers, all of which is reported accordingly.

e. The claim of Jas. W. Newman, publisher of the "Times," Portsmouth, for printing brief of O. F. Moore, Att'y for the Iron Railroad Division of the T., C. & St. L. Ry., in case of Iron R. R. Co. *vs.* Kelly, in Supreme Court of Ohio.

The master finds that a brief for the Railroad Co. was printed substantially as claimed, on or about September 25th, 1883; that the printing was contracted for by the then attorney for the railway in a suit pending; that it was necessary, and that there is due thereon the sum of thirty and 30-100 dollars, with interest from said 25th September, 1883; and that the same is a debt against the receivers of the T., C. & St. L. Railroad Co., to be charged as expense of the Iron Railroad Division.

2. *Specified liens on portions of the road.*

a. Fourteen bonds of the Dayton & Southeastern Railroad Co., secured by a mortgage on that road prior to its consolidation with the Toledo, Delphos and Burlington R. R. Co. were shown to be outstanding by the testimony of W. J. Craig, Receiver. (Page 5 of first notes of testimony before the master.) Mention of these was accidentally omitted from the master's preliminary report, but upon suggestion of the undersigned, notice of them and of their probable lien was inserted in the advertisement of sale and notice to bidders at the sale of the Dayton and Southeastern Division. The master reports that such bonds, amounting to fourteen thousand dollars, are outstanding, and a first mortgage lien upon said divisions of the road, unless the same have been taken up and cancelled by the purchasers at the said sale.

b. Claim of Thomas J. Murdock, of Ironton, Ohio, upon a judgment rendered in his favor against the Toledo, Cincinnati & St. Louis Railroad Co. in the Court of Common Pleas for Lawrence County, O.

140 The master finds the facts set forth in the intervening petition to be true; that said judgment is a valid and subsisting lien on the Iron Railroad Division of the T., C. & St. L. Railroad; that said judgments amounted to the sum of $350.00 with interest from June 26, 1883, and costs $501.31,— total $851.31 without interest; one Charles R. Balt claims to be assignee of the judgment, but from

all evidence is wanting. Said judgment had not been paid, or any part thereof, when said Iron Railroad division was sold under the order of this court.

c. Claim of the estate of Mr. Wise, deceased (Ironton, Ohio), for work, labor and materials in constructing a tunnel and timbering the same, upon the Ironton extension of the T., C. & St. L. Railroad.

The master finds as matter of fact, that in July, 1883, one Mr. Wise furnished materials and performed the labor in timbering a tunnel known as tunnel No. 1, on the Ironton Division of the T., C. & St. L. Railroad. That the true amount due said Wise for said materials and labor was $2,278.56 on the 4th day of August, 1883; that said work was finished on the 23rd day of July, 1883, and on the 23rd day of August, 1883, said Mr. Wise served upon C. C. Clarke, Division Superintendent of said Division of the T., C. & St. L. R. R., notice addressed to the secretary or other officers of the Toledo, Cincinnati and St. Louis Railroad Co.; which notice recited that said Wise had filed in the office of the Recorder of Lawrence County, Ohio, an itemized statement of labor performed and materials furnished in the work of timbering said tunnel, amounting to said sum of $2,278.56. The master finds that said itemized account was filed as recited in said notice, and that it was intended by said as a perfecting of a lien under the statutes of Ohio (R. S. Sec. 3,195-3,208) upon such railroad.

The master finds that the amount of such indebtedness as above stated was recognized by the receiver as a just debt for the labor and materials described, against the Toledo, St. Louis & Cincinnati Railroad Company; and that it was and is a just debt against said company and remains unpaid and unsatisfied; that since the same accrued the said Mr. Wise departed this life, and that the same is due and payable to the administrator of the estate of said Mr. Wise.

As bearing upon the question of specific lien, the master finds that after the accruing of said indebtedness, and before the filing of
141 the said itemized bill and the giving of notice to the said C. C. Clarke, Division Superintendent, the first appointment of Receiver Dwight in these cases had been made, and said Dwight was in possession of said road as such receiver under the order of this court; that said Clarke had been division superintendent of the division in which said tunnel was, under the said Railroad Co., and as such superintendent had been the chief managing and business agent of said company upon and for said division; that at the serving of said notice upon him, to-wit, on the 24th day of August, 1883, said Clarke was division superintendent for Dwight, Receiver, on said division, having been continued by said receiver in the same management and authority which he had exercised under the railroad corporation; but no evidence has been offered to show whether or

not said Clarke retained any connection with said corporation after the possession of the road by the receiver, or whether said notice in fact reached the secretary of said corporation or any continuing managing officer of the same.

The master having been informed that his Honor, the late Judge Baxter, had personally heard and passed upon similar questions of lien in these suits, does not report upon the law in regard to the alleged lien, but limits himself to the amount and general validity of the debt, and to the facts offered in evidence before him which bear upon the question of lien.

d. Claim of estate of John W. Kennedy for right of way near 8-mile house, Sycamore Township, Hamilton Co., against Cincinnati Northern Division.

This claim was mentioned in the master's preliminary report, p. 22 (printed page 13), and testimony was taken thereon. Since that time the parties came by counsel and consented that a finding of one hundred dollars as liquidated damages against said Cincinnati Northern Division should be made, and that upon payment of the same all claim of said estate and the heirs of said John W. Kennedy, deceased, should be abandoned and held to be finally settled and paid.

The master finds and reports accordingly.

e. Claim of Mathers and Beresford for right of way near Pleasant Ridge, Hamilton Co., Ohio, against Cincinnati Northern Division.

142 This claim has also been settled by the parties. Mathers had contracted to give the right of way through his farm, the farm being mortgaged to Mrs. Beresford. Mathers sued in the State Courts for damages (among other things) by reason of failure of the company to fence the track, and recovered a judgment for $375.00. Mrs. Beresford, who was not a party to the right-of-way contract, foreclosed her mortgage and bought in the land. After imparting, the claimants, Mathers and Beresford, through their attorney, Thomas M. McDougal, Esq., offered to take $575.00 in full of the judgment, all damages and the right of way. This was accepted by George Hafer, Receiver.

The master finds and reports accordingly.

f. Claim of Cambria Iron Co. for specific lien on rails furnished by them.

In his preliminary report, p. 31 (printed p. 19), the master reported this claim as for $22,943.00 for steel rails and prepaid freight. The rails were delivered in the month of July, 1883, less than a month before the consolidated road passed into the hands of the receiver. In said preliminary report the master further found and reported that the rails were not in excess of a reasonable quality for

repairs of the road to keep the track in operating order, and that they were laid about one-half on the Toledo Division, and one-half on the Dayton and S. E. Division. No question has been made as to the amount of the accounts; the controversy has related solely to the question of lien.

Such lien is claimed upon the general doctrine that property does not pass in sales or cash unless the price is in fact paid. The contract in this case shows that the price was to be paid in cash, but it also shows that the delivery was to be in installments in April, May and June, 1883. This was not complied with by the vendor, but, in the absence of evidence to the contrary, the master presumes this was waived.

The rails were intended to be laid in the track and when so laid became fixtures and part of the real estate covered by existing mortgages. This being known to both parties from the character of the property, the master finds as matter of law that when the vendors delivered the rails and allowed them to be put into the track before the cash was paid, they waived the lien upon the chattels, as
143 chattels, and acquired no lien upon the real estate, unless it be under the "six-months" rule, which the court has reserved for its own decision.

3. Apportionment of car rentals, &c., to the Iron Railroad and other matters in controversy between it and the other divisions of the T., C. & St. L. Railroad.

In his original preliminary report the master reported the amount which the Iron Division of the T., C. & St. L. Railroad had earned over its expenses, under the system of separate accounts kept by the receiver under direction of the court. He also reported the apportionment of expenses upon a scheme of percentages, also adopted by the receiver, and the apportionment of the car rentals upon another scheme of percentages, based upon the mileage of locomotives and cars actually run on the several divisions. In such preliminary report the master charged the Iron Railroad Division with 1.98 per cent. of the rentals of rolling stock, because "having a third rail for the use of narrow-gauge cars and engines, all the 'through' business was done in narrow-gauge rolling stock, and part of the 'local.' The mileage, therefore, was made up in part on that road, and the master finds that it is right that it should bear its proportion of the rentals." (Page 53, printed p. 32.)

In the interlocutory decrees entered, express saving was made of the rights of parties to be heard further upon questions not finally settled by the decrees of sale, &c., and further testimony and argument on this particular branch of the cases has been heard by the master.

Counsel for the mortgagees and purchasers of the Iron R. R. (John C. Coombs, Esq.) presented a printed argument in which

the master is requested to report explicit findings on eight special points made. To enable the parties to make up a record upon the issues they present, the master will report *seriatim* upon the points so presented, but will first report in general his findings of fact and law bearing upon this portion of the case.

The master did not, in his former report (nor does he now) regard the division of receipts and expenses adopted by the receiver, and approved in the master's report, as one susceptible of mathematical accuracy. It was one which the receiver and the expert railway accountants in his service regarded as a fair one in view of the
144 condition of various parts of the whole system, their mutual dependence and relationship and the indirect as well as the direct advantages which the subdivision of a general system gained from the allowance of the whole. This led to the allowance of an "arbitrary" increase in the proportion of earnings credited to the "terminals" at Toledo and Cincinnati. The reasonable fairness of the percentages assigned was all the master then believed or now believes to be attainable in such a division and all that he intended to report. He sees no reason to change the conclusions of the preliminary report in this respect.

He finds as matter of fact, that the right to lay a third rail upon the roadway of the Iron Railroad was the subject matter of a contract between the Iron Railroad Co., the Toledo, Delphos and Burlington Railroad Co. made prior to the consolidation of the two (October 21, 1881), and prior to the formation by further consolidation of the Toledo, Cincinnati and St. Louis Railroad Co. (See preliminary report, p. 10, printed page 7.)

He finds as matter of law, that upon the lawful consolidation of the several pre-existing corporations into the T., C. & St. L. Railroad Co., as reported in his preliminary report, said last-named consolidated company became the sole owner of the several properties and rights which the pre-existing companies had held and owned (whether the same were corporeal or incorporeal, hereditaments, or choses in action), subject only to such liens by mortgage or otherwise as had attached to the several portions of such properties before such consolidation.

He further finds as matter of law, that upon the lawful consolidation of the Iron Railroad Co. into the Toledo, Delphos and Burlington Railroad Co., the last-named company became the sole owner (subject to liens as aforesaid) of what had before that time been the separate properties of said two companies; that said "third rail track right" was an easement in the property of said Iron Railroad Co., held and owned prior to such consolidation by said Toledo, Delphos and Burlington R. R. Co., but that after such consolidation said easement merged in the ownership of the Iron Railroad Company, which by the consolidation was vested in said Toledo, Delphos & Burlington Railroad Co.

He further finds as matter of law, that after the merger last above mentioned, no "third rail track right" in the Iron Railroad existed but the same was swallowed up in the larger right of property and the right to have and lay any number of rails on the Iron Rail-
145 road which vested in the consolidated company as aforesaid; that the third rail upon said Iron Railroad became and was simply a corporeal improvement of said road and was covered by the mortgages upon said Iron Railroad and has been sold under the same by the decrees of this court.

The master believes that his above findings of fact and of law cover all the first four points on which he has been requested to report by the counsel for the purchasers and mortgagees of the Iron Railroad.

As to the fifth proposition submitted by said counsel, he finds, as matter of law, that the receivers appointed by this court took custody of the whole property of the defendant, the consolidated Toledo, Cincinnati & St. Louis Railroad Co., consisting of a system of railways which included the Iron Railroad, the latter having three rails; that such property was one property, subject to separate and specific liens upon several portions thereof, but subject also to the just debts and obligations of the consolidated company which were a burden upon the whole system of roads; that the direction of the receiver, whether he should operate said system as a whole or in separate and independent parts, was a matter wholly in the discretion of the court, looking to the probable outcome of such operating, and to the interest which the general creditors of the consolidated company would have in any surplus which might by any possibility remain after the specific liens were marshalled and satisfied, and that the mortgagees of the Iron Railroad had no right to demand that the third rail and narrow-gauge track on the same should not be operated by the receiver under the direction or permission of the court, *pendente lite*; they might be heard at any time upon motion to the court to direct the receiver to manage the property under his custody in one way or another, but the former existence of the now merged "third rail track right" had nothing to do with the discretionary management of the property by the court through its officers, *pendente lite*.

As to the sixth proposition submitted by said counsel, there has been no evidence before the master showing the purpose or intent of Receiver Dwight in operating the narrow gauge business on the Iron Railroad. The Receiver, Craig, testified that he operated the whole system "as an entirety, under the various orders in the causes in which I (he) was appointed receiver" * * * "I have not paid any attention to the division into constituent parts, in operating—I could not do so in practical working of the road"—(1st bundle of testimony, p. 7). The receiver, in thus operating,
146 kept account of strictly local income and expenses, apportioned the earnings on "through" business in accordance with a table

of percentage before reported, as also the "general expenses." The master is unable to report further as to the "intention" of the receivers, or either of them. He has before reported that the operation of all parts of the road under the receivership was at a loss, except the Iron Railroad Division, during the period for which the accounts have been submitted to the master. If parties had believed it better for all concerned that the operation of the system or any part should be abandoned during proceedings in these suits, the master finds as matter of law that their remedy would have been to move the court so to direct the receiver; the reasons for so doing and the objection would then have been officially determined; now, the only question seems to be: Are there good reasons why the court should change the distribution of expenses actually incurred or credits actually given, which the receivers in their accounts have reported? The master, having already reported that the Iron Railroad in the hands of the receiver was both part of the narrow-gauge system and also a standard-gauge short road, he is unable to find that the receiver, under the circumstances, ought not to have continued to operate the narrow-gauge track upon it, in connection with the rest of the system, nor that there was any reason for discontinuing the use of the narrow-gauge track on the Iron Railroad which would not have applied to the whole property.

The master finds as a matter of fact that the amount credited by the receivers to the Iron Railroad Division, as earnings upon the narrow-gauge track, was $9,882.81. But a sum of $653.71 was earned by such track in the half month next before the road was delivered to purchasers at master's sale. This arose in exactly the same manner as the rest of such earnings; but Receiver Craig erroneously credited it to the Dayton & Southeastern Division.

That sum should be credited to the Iron Railroad Division, making the total amount $10,536.52, and the sum of $653.71 should be deducted from the credits given by the receiver to the Dayton & S. E. Division. (See testimony of Auditor Anthony, pp. 17, 59, 111, 219, 135.)

The gross earnings and expenses of the Iron Railroad Division, down to November 1, 1885, as shown by the receivers' books, are as follows:

147	EARNINGS.	EXPENSES.
Dwight's Receivership . . .	$24,681.45	$7,113.53
Craig's Receivership, November 1, '83, to July 19, '84, the time the road was delivered to purchasers .	47,179.12	23,632.36

Net earnings, Dwight's Receivership .	17,567.92
Net earnings, Craig's Receivership .	23,546.76
Total net	41,114.68

To this must be added the sum of $653.71, mentioned above.

From the mode in which the accounts were kept it is impossible to separate the expenses incident to narrow-gauge business from the whole expenses of the Iron R. R. Division, as the roadbed, stations, section gangs, offices and general expenses had to be kept up; the master believes from the evidence and therefore reports that the discontinuance of narrow-guage business could not materially reduce the expenses of the Iron Railroad Division, except in the item of narrow-gauge car rentals, final repairs, &c., which, in the master's preliminary report, were stated at $10,592.94, or very nearly the sum credited as earnings of the narrow-gauge business; but this has not yet been definitely passed upon by the court in this circuit, and in the Seventh Circuit the rentals reported by the master have been largely reduced, so that even the increase of time since the preliminary report (at such reduced rate) would probably still leave the charge in this respect less than the narrow-gauge earnings above reported.

If the expenses of such narrow-gauge business were divided upon estimates based substantially upon the relative amount of earnings as compared with the broad-gauge business, it would amount to, say, one-seventh of the whole expense charged, or about $4,400. This was raised by the witness for the mortgagees and purchasers to $7,461.52 (testimony of C. C. Clark, pp. 7-8), but the master is unable to accept the principles on which so large a part of the total expense should be charged to the narrow-gauge business, in any event. From the point of view the master has adopted, viz: to inquire whether, the third rail being in the track, it was an injury or loss to the net income of the Iron R. R. Division to do the narrow-gauge business at all, the master finds and reports that it was not an injury and that to have refused and discontinued it would
148 have caused additional loss to the other parts of the system, if they were operated at all. He believes that if the whole system were not to be entirely abandoned, the method of operating the Iron R. R. Division and of accounting with it by the receivers was a reasonable one.

As to the eighth proposition submitted by the said counsel, the master finds as matter of fact that the whole earnings of the system and all parts of it, including the Iron R. R. Division, were used by the receivers to pay current expenses of operating the whole system, keeping the accounts of the several divisions separate under the order of the court, as before stated. The master finds as matter of law, that, under the interlocutory decrees entered in these cases, the

excess of earnings over expenses in the case of the Iron Railroad Division so used by the receivers for operating the other divisions of the road and system, ought to be a first charge against the funds arising from the sale of such other divisions, and to be paid out of such funds into the hands of the receiver or into the registry of the court, to be applied to the payment *pro tanto* of the senior lien upon the Iron Railroad, next after the receivers' debts upon such Iron R. R. Division, if any there be. The marshalling of liens upon the road and the distribution of the fund arising from the sale has not been before the master and he is unable to report what is the senior lien, nor whether the mortgagees have preference over creditors of the T., C. & St. L. Railroad Co. for debts incurred in operating the system for the six months next before the appointment of the receiver; neither such six months' expense of operating nor the car rentals have been taken into the receiver's accounts when reporting a net credit of $41,114.68 in favor of the Iron R. R. Division in his said accounts.

4. A claim of the mortgagees and purchasers of the Dayton and Southeastern Division, that that division should be credited with a sum for the transportation of coal to other divisions, in the mutual accounting between such divisions.

The master finds as matter of fact, that in the mode of keeping accounts separately for the several divisions of the system, the receivers did not make any charge to any division for the transportation of "Company property" from one division to another, nor for the transportation of company employees as passengers.

The "Company property" transported consisted of coal for fuel, ties, rails, bridge materials, building materials, ballast, materials used in car and locomotive shops, damaged cars, &c., engines
149 going to and from the shops for repair, ordinary supplies, &c.

As no account was kept of the transportation of such materials with the several divisions, it is impossible now to tell how much each division contributed to what was thus treated as general expense.

The item of coal for fuel is, however, an exception to this extent, viz: that the vouchers for its purchase show the gross amount consumed, and the points at which it was bought.

It is claimed before the master, on behalf of the Dayton & Southeastern Division, that, in the absence of more exact date, the mileage made by locomotives on the several divisions would be a fair criterion of the relative amount of fuel used on each division. The master finds that, if the distribution of such fuel is now to be determined, the method so claimed is as fair a one as can now be used. In the absence of exact accounts of the distribution, any method must be approximated only, as no two locomotives consume the same amount, and the use in shops, stations, offices, &c., is an uncertain quantity. The master therefore reports that as an approximation in estimating fuel used he has adopted and followed the method so stated.

In estimating the quantities transported over any one division for use upon the others, the master has first deducted from the gross estimate of fuel used on any division the amount shown by the receivers' vouchers to have been bought or furnished from mines or dealers upon such division, and the remainder he finds to be the net amount in regard to which the claim for transportation is made, and will be hereinafter considered.

He further finds that the mines from which the coal are obtained are shown by the vouchers and that the distance over the several divisions which such coal was in fact transported is susceptible of easy computation.

He further finds the fact to be that the Iron Railroad Division was supplied with coal wholly by its own line. The same was the case with the Dayton and Southeastern Division. But the other divisions were supplied chiefly from mines so situated as to necessitate transportation over the Dayton and Southeastern Division, and to some extent over the Cincinnati Division and the Dayton Division. From the data thus indicated the master finds as matter of fact that 150 there was transported over the Dayton and Southeastern Division for use on other divisions forty thousand, four hundred and thirty-one tons of coal, distributed and used as follows, viz:

To the Toledo Division	18,200 3-10	Tons
To the St. Louis Division	5,291	"
To the Dayton Division	8,771 1-10	"
To the Cincinnati Division	1,400 4-10	"
To the Cincinnati Northern Division . .	6,768 2-10	"
Total	40,431	Tons

There was in like manner transported over the Dayton Division, for use on the other divisions, twenty-three thousand, four hundred and ninety-one 3-10 tons of coal, distributed and used as follows, viz:

To the Toledo Division	18,200 3-10	Tons
To the St. Louis Division	5,291	"
Total	23,491 3-10	Tons

There was in like manner transported over the Toledo Division for use on the St. Louis Division:

To said St. Louis Division	5,291	Tons

There was in like manner transported over the Cincinnati Division for use on the Cincinnati Northern Division:

To said Cincinnati Northern Division . .	6,768 2-10	Tons

The coal above reported as transported over the Dayton Division,

Toledo Division and Cincinnati Division was part of that which had first been transported over the Dayton & Southeastern Division.

The claim is made on behalf of the Dayton and Southeastern Division that such transportation should be paid for at the rate of one cent per ton per mile, and that the divisions furnishing the transportation should be credited in the mutual accounting at said rate whilst the division consuming the coal should be debited with their respective proportions of such charge for transportation.

This raises two questions: 1st. Is the subject-matter a proper one for such a claim and charge? And, 2nd. What would be a
151 fair rate in view of the relations of the divisions to each other and to the consolidated corporation?

The master finds that neither of the receivers made any charge for transportation of coal or other "Company property" to the several divisions, as hereinbefore stated (p. 35, *ante*). No evidence has been offered showing the respective burdens of the several divisions in transporting other "Company property" besides coal, but the usual cause of business on a railroad situated as this was makes it probable that other bulky articles, such as iron rails, ties, &c., were distributed so as to counter-balance to some extent at least the charge claimed upon coal transportation; but as no direct evidence has been offered on this point, the master finds that the item of coal transportation is so large a one as to give reasonable ground for making of it an exception to the general rule that company property was carried free; especially as the movement of coal cars entered into the general account of car mileage upon which in his former report the master based the distribution of charge for car rentals among the several divisions. The fact that neither of the receivers kept any account of such transportation, however, is strong evidence that, as between the divisions, they did not think it proper to charge it; though Receiver Craig, after his connection with the property had ceased, testified that such a charge would be right, though he himself had neither made it nor embodied it in his account books any direct method of ascertaining it, and the master has been obliged to report the probable amount of the transportation from assumed percentages and approximate estimates. In view of such considerations, therefore, the master reports that some charge for coal transportation should be made between the divisions, but that this should rather be fixed at a sum which would save the creditor divisions from actual loss upon these particular shipments, than at either the average cost of all kinds of freight upon the road or the usual market rate of transportation.

To enable the court readily to correct any error he may make in this respect the master reports the computation at the rate claimed for the Dayton and Southeastern Division at the rate at which the receiver transported coal for private parties, and at the rate which the master finds would save from actual loss on these shipments.

1st. Amount claimed for Dayton and S. E. Division. Evidence was introduced to support a claim of the rate of one cent per ton per mile. Computed at this rate and upon the basis of quantity in 152 tons above found and reported, the amounts credited to the divisions furnishing transportation and debited to those consuming the coal would be as follows, to-wit:

Dayton and Southeastern Division, Credit (made up of following debits):		$45,923.74
Toledo Division, Debit	$20,930.32	
St. Louis Division, "	6,084.55	
Dayton Division "	10,086.82	
Cincinnati Division, "	1,512.41	
Cincinnati Northern Div. "	7,309.64	
	$45,923.74	
Dayton Division, Credit (made up of following debits):		$22,551.49
Toledo Division, Debit	$17,472.26	
St. Louis Division, "	5,079.23	
	$22,551.49	
Toledo Division, Credit (made up of following debit):		$5,661.30
St. Louis Division, Debit	$5,661.30	
Cincinnati Division, Credit (made up of following debit):		$1,150.66
Cincinnati Northern Division, Debit	$1,150.66	

A summary of above debits and credits so as to show the resulting balance claimed for or against each division, is as follows:

	DR.	CR.
Dayton & Southeastern Division		$45,923.74
Toledo Division,—	DR.	CR.
To Dayton & S. E. Division	$20,930.32	
To Dayton Division	17,472.26	
By St. Louis Division		$5,661.30
Balance of debit		32,741.28
	$38,402.58	$38,402.58

	DR.	CR.
153 Dayton Division,—		
To Dayton & S. E. Division	$10,086.82	
By Toledo Division		$17,472.26
By St. Louis Division		5,079.23
Balance by credit	12,464.67	
	$22,551.49	$22,551.49

	DR.	CR.
St. Louis Division,—		
To Dayton & S. E. Division	$6,084.55	
To Dayton Division	5,079.23	
To Toledo Division	5,661.30	
Balance of debit	$16,825.08	

	DR.	CR.
Cincinnati Division,—		
To Dayton & S. E. Division	$1,512.41	
By Cincinnati Northern Division		$1,150.66
Balance of debit		361.75
		$1,512.41

	DR.	CR.
Cincinnati Northern Division,—		
To Dayton & S. E. Division	$7,309.64	
To Cincinnati Division	1,150.66	
Balance of debit	$8,460.30	

First General Summary:

No. 1, balances as per claim so stated.			
Dayton & S. E. Division,	credit		$45,923.74
Dayton Division,	"		12,464.67
Toledo Division,	debit	$32,741.28	
St. Louis Division,	"	16,825.08	
Cincinnati Division,	"	361.75	
Cin'ti Northern Division,	"	8,460.30	
		$58,388.41	$58,388.41

It was shown in testimony by the books of the receivers that, during the period in controversy, coal was transported for private
154 shippers at rates which were made to meet the competition in the market, and which are therefore presumably market rates. No shipments for such private parties were charged as high as one cent per ton per mile. The highest testified to was 8 1-10 mills per ton per mile, and only 34 tons at that rate. The other ship-

ments were charged at rates varying from a little under 2½ mills to 7 6-10 mills per ton per mile. By far the largest shipments thus shown by the books are shipments to Toledo, for which the receiver charged 4 84-100 mills per ton per mile. These shipments exceed in amount all others put together. The master therefore finds that 5 mills per ton per mile would be a full market rate for the transportation of coal over the lines in the hands of the receivers, as fixed by them in their dealing with private parties. The relation of this market rate to cost of transportation will be hereinafter considered and reported upon. At such rate, of 5 mills per ton per mile, the tables hereinbefore stated would be reduced one-half, and the statement of debit and credit balances would be as follows, which is reported as a second table for the information of the court:

Second General Summary:

No. 2, balances at 5 mills per ton per mile.

		DR.	CR.
Dayton & S. E. Division,	Credit		$22,961.87
Dayton Division,	"		6,232.33
Toledo Division,	Debit	$16,370.64	
St. Louis Division,	"	8,412.54	
Cincinnati Division,	"	180.87	
Cincinnati Northern Division,	"	4,230.15	
Totals		$29,194.20	$29,194.20

But there is still a third mode of statement which is worthy of consideration, viz.: That based upon the lowest price at which the receiver was willing to contract with private parties for the transshipment of coal rather than refuse to carry it. As hereinbefore stated, coal was carried for private parties as low as 2 46-10 mills per ton per mile; 198 tons being reported as carried at that rate, and other shipments were made at rates nearly as low, though in relatively small quantities. The relation of these rates will be considered hereafter, but for the information of the court, the master reports a third table at this rate of 2½ mills per ton per mile, being the minimum (in round numbers) at which the receiver in fact contracted with private parties.

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Third General Summary:

No. 3, balances at 2½ mills per ton per mile.

		DR.	CR.
Dayton & S. E. Division,	Credit		$11,480.94
Dayton Division,	"		3,116.17

Toledo Division,	Debit	$8,185.32	
St. Louis Division,	"	4,206.27	
Cincinnati Division,	"	90.44	
Cincinnati Northern Division,	"	2,115.08	
Totals		$14,597.11	$14,597.11

Assuming that some charge may be made between the divisions for coal transportation, it remains to inquire which if either of the above rates is a proper one in such accounting, all circumstances being fully considered.

Mr. Craig, formerly receiver (but testifying after he had ceased to be such), gave one cent per ton per mile as a fair charge and as about the cost of the transportation. Mr. Crossly, expert accountant, gave the same rate, and Mr. Anthony, former auditor for the receiver (testifying after he had ceased to be such), gave the same rate as about the average cost of transporting freight and therefore as a reasonable one. The master finds as matter of fact that taking the total business done by the receivers, both local and "through," and comparing it with the total cost of operating the system under the receiver, it is true that the average cost of the freight services was probably over one cent per ton per mile; but in determining the fair charge upon a certain kind of freight the master cannot find that this rule would be the proper one. If the receiver had transported a large quantity of coal for a private trader without an explicit contract, and suit were brought upon a *quantum meruit*, the master cannot doubt that the market rate would be the measure of damages, and not the actual cost to the carrier. If business were for any cause almost totally suspended on a railway line having large numbers of employees and great fixed expenses for repair and keeping up roadbed and track, the cost of transporting a small amount of freight might be multiplied many fold beyond what would be a remuner-
156 ative rate to a busy and well-managed road in competition with it. For the receiver to have charged the Toledo Division one cent per ton per mile for the same service he was charging a Toledo merchant less than half a cent, the master finds would have been unreasonable. He would have made the coal cost more to the division than a separate receiver would have had to pay private dealers to deliver it on their own line. The master finds, therefore, as matter of mixed fact and law, that upon a *quantum meruit* with private dealers, half a cent per ton per mile was a fair market rate as prices were then ruling, and that such charge is the maximum that would be reasonable as between the several divisions of the consolidated railroad.

But the master finds further that the maximum which would be reasonable is not a fair rate of charge between divisions of a consolidated road, such as the T., C. & St. L. He thinks rather that the minimum, which would be reasonable, is the proper charge in

such cases. This has been already referred to in a former part of this report in considering a claim on behalf of the Iron Railroad Division against the Dayton and S. E. Division, under the alleged "third rail" contract. The cost of transportation in gross is made up of all the items of both fixed charge and current expense of operating a railroad; but experts now agree that when the greater part of this cost has been incurred, the question in regard to a particular mass of freight may be whether its refusal would increase the earnings of the road; if not, it may be better management to take it at a lower price than the average cost of transportation. If a car were going to a certain station empty, any price whatever, no matter how low, may warrant filling it with freight which would not otherwise go, for the cost of hauling the empty car would be nearly the same as of hauling the full one. It is on this principle alone that the receivers can justify transporting a great deal of freight (as they have done) below what is shown to be the average cost of the transportation. In reference to business competed for by different roads, this is a delicate and difficult problem in railway management. (See Quarterly Journal of Economics, October, 1886, p. 35, &c.) Between different sections of the same property, however, and in the transportation of "Company property," it seems clearly right that the only charge proper to be made is one to be approximately fixed by inquiring what extra cost has another part of the road been put to by reason of this particular freight, which would not have been incurred if the freight had not been carried. The general expenses of the road would not have been the same, the stations, offices, telegraphers, road-master, track-hands, switchmen, &c., would all have been the same.

It is hard to point out any extra expense incurred except in the 157 pay of men employed on the coal trains themselves, and in hauling the coal and some slight wear and tear of track and machinery. It is presumable that the receivers would have refused to take any freight under any circumstances from private parties, if this portion of actual increased cost was not at least made good. To do otherwise would be knowingly to give away the property entrusted to them. But as has been reported, the receivers did in fact continue to carry coal for private parties on a scale of prices reaching as low as $2\frac{1}{2}$ mills per ton per mile. There is no other practical means now available of determining how the receiver estimated this increased cost. As an approximate method of reaching it, therefore, the master finds that $2\frac{1}{2}$ mills per ton per mile would cover this increased cost, which in the actual circumstances would have been saved to certain divisions if the coal had not been carried, and that in the relation of the divisions to each other this is a fair charge to be debited and credited to the several divisions as in the last table above set forth.

If the master could find, in the accounts of the receivers and in the schedules prepared, any satisfactory means of estimating the pro-

portion of car mileage made by coal trains to the whole car mileage made in all the business of the road, he would have preferred to report in favor of amending the distribution of car rentals so as to apportion it to the divisions exclusive of the train mileage of coal trains, but he has been unable to find mathematical data for doing this, and has, therefore, been forced to adopt some approximate method based upon the testimony before him.

5. Claims of counsel for fees in those cases specially referred by the court.

Several such claims were reported in the second report filed by the undersigned, and the only one remaining of those specially referred was that of Wm. M. Ramsey, Esq., of counsel for the Ballou Car Trust, so-called.

The claim was for one thousand dollars for services as attorney and counsellor. The testimony of Mr. Ramsey was taken as to the character and extent of the services, &c., and of other witnesses as to their value. All the testimony fully sustained the claim, and the master finds, and so reports, that the said claim of one thousand dollars is a reasonable and valid one.

6. The account between the Delphos Trust, so-called, and the Toledo, Delphos and Burlington R. R. Co., and the Toledo, Cincinnati and St. Louis R. R. Co.

158 In his preliminary report, pp. 10-13 (printed pp. 7-9), the master reported that what was known as the Buckeye Branch was built from Welston partly before and partly after the final consolidation of the several constituents of the T., C. & St. L. Company; that the legal title had not been placed in either company, and the property in the branch depended upon a full investigation of the affairs of said Delphos Trust, in connection with the several railroad companies. He also reported that a general account was open between said Delphos Trust and the T., C. & St. L. R. R. Co., with claims on behalf of creditors of the Railroad Co. that a balance of debits would be found against said Delphos Trust. If the last allegation should be true, the title to said Buckeye Branch, being 10¾ miles of railroad, would be in said T., C. & St. L. Railroad Co., and would be assets.

None of the parties have offered further testimony on this subject since the preliminary report was made, but as the subject is closely connected with the affairs of the Western Construction Co., which assigned to the Delphos Trust, and questions relating to these companies are understood to be before Messrs. Fishback and Ricks, masters appointed to investigate other questions than those referred to the undersigned, he would respectfully ask to be relieved from further examination of matters connected with said Buckeye Branch and said Delphos Trust.

7. The so-called Ballou Car Trust on Dayton and S. E. Division.

This relates to the Car Trust more properly described as Boston Car Trust, Series E.

Considerable testimony was offered by parties on this subject of controversy, but, before it was closed, negotiations for an agreed finding were begun between them, and the completion of testimony and argument were by mutual consent postponed. The master is informed that this continues to be the situation, and no additional findings can now be made.

8. Claim of Cincinnati, Hamilton & Dayton Railroad Co., for certain track rights, &c., in the City of Dayton.

This is based upon a contract between the Dayton, Covington and Toledo Railroad Company and said Cincinnati, Hamilton & Dayton Railroad Co., reported on p. 15 (printed p. 10) of the preliminary report by the undersigned.

159 Since that report, the C., H. & D. R. R. Co. has appeared in this case, and a statement of the amount due to it for rental and repairs under the contract has been agreed upon between them and the purchasers of the Dayton and Southeastern and Dayton Division of the T., C. & St. L. Company.

The master finds that the rental agreed upon was four thousand dollars per annum, and that at the time of said sales of said divisions, the sum of six thousand dollars, being 1½ years' rental, was due and unpaid.

He also finds that under said contract the expense of laying certain additional track connections in said Dayton, from the junction with said C., H. & D. R. R. to the Home Avenue R. R., was to be paid by said T., C. & St. L. R. R. Co., as successor to said D., C. & T. R. R., and that at the date of the sale aforesaid there was due thereon to said C., H. & D. R. R. Co. the sum of five thousand, two hundred and fifty-four dollars and seventeen cents ($5,254.17), and that the sum of both said claims amounts to the sum of eleven thousand, two hundred and fifty-four 17-100 dollars ($11,254.17), and is due as aforesaid.

In his said preliminary report, the master recommended that said Dayton Division be sold subject to said claims, said track rights being appurtenant to said division, and important if not essential to it.

The master is not officially informed whether the sale of said Dayton Division was in fact made subject to said claims.

If it was, the sum so found due should be paid by the purchasers of said Dayton Division, in addition to the purchase price at which said property was bid off.

If it was not, the said sums so found due should be treated as liens upon the property as a whole, to be paid *pro rata* by the purchasers

of the several divisions in the same manner as other preferred debts are paid.

Owing to the fact that the Cincinnati, Hamilton & Dayton Railroad was not represented when the preliminary report was filed, the counsel for other parties than the purchasers of said Dayton Division did not take part in and were not specially notified of the
160 final submission of that claim, and the report as to the mode of payment is made in the alternative, to give them the opportunity of being heard before the court.

All of which is respectfully submitted.

J. D. Cox,
Special Master.

MASTER'S FEES.

The master would respectfully state that he devoted thirty days to testimony and the various hearings before him, but that in consequence of the receiver and his employees referring all claimants to him, he was, during the years 1884-1885, constantly obliged to keep up a voluminous correspondence with claimants and creditors of every class; the time occupied would be more than sixty days in all. He would, however, ask allowance for 50 days, at $30.00 per day, or fifteen hundred dollars in all for services in the period covered by this report.

J. D. Cox, *Special Master.*

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the United States Circuit Court, within and for the division and direct aforesaid, do hereby certify that the foregoing is a true and complete copy of the original third (and final) report of Special Master J. D. Cox, filed in the clerk's office of said court, on the 7th day of January, A.D. 1887, in the causes entitled Central Trust Co., of New York, *vs.* The Toledo, Cincinnati & St. Louis R. R. Co., *et al.*, which causes are numbered 3,554, 3,576-77-78 and 79, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, Ohio, this 2nd day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By ————*Deputy Clerk.*

161 **"R" 2.**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of October, being also the fourth day of that month, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and eleventh.

Present, the Honorable George R. Sage, District Judge.

On February 19th, A.D. 1887, the following proceedings were had, to-wit:

The Central Trust Company, of New York,
vs.
The Toledo, Cincinnati & St. Louis Railroad Co., *et al.*

This cause coming on to be heard upon the final report of Jacob D. Cox, Special Master herein, and the exceptions thereto and the argument of counsel, and the court being fully advised, it is considered by the court that the exceptions to so much of said master's report as finds the sum of forty-one thousand, seven hundred and forty-eight 39-100 ($41,748.39) due to the Iron Railroad from the other divisions of the Toledo, Cincinnati and St. Louis system, be and the same are hereby overruled, and that the master's finding of said sum due be and it hereby is confirmed. And it is further ordered that the Iron Railroad be not required to pay any indebtedness or charge against it in said case, except out of said fund and upon an accounting with it therefor.

162 THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said court. And I further certify that there never was filed any petition to rehear said decree nor any appeal taken therefrom or bill filed to review the cause.

In testimony whereof, I have hereunto set my hand and affixed the

seal of said court, at the City of Cincinnati, O., this 11th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By JANIE M. F. COWEN, *Deputy Clerk.*

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163 **"V" 2.**

Endorsed on the back of the following, is the following:

7,706–7,814 R. 10.

No. 69*a* The Central Trust Company of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.*,

and

Same *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*

Petition and Claim in behalf of the Iron Railroad and bondholders.

$24,639.19

No. 7,814	$12,278.46
7,706,	12,360.73
	$24,639.19

Filed Feb. 8, 1886.

NOBLE C. BUTLER, *Clerk.*
JOHN C. COOMBS, *Sol.*

164 CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF INDIANA.

In Chancery.

The Central Trust Company of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company,
and
Same *et al. vs.* Toledo, Cincinnati & St. Louis Railroad Company, *et al.*
} *Nos. 7,706 & 7,814.*

To the Honorable, the Judges of the Circuit Court of the United States for the District of Indiana.

Respectfully represents your petitioner, that he is the purchaser, and also the attorney for all the first mortgage bondholders, of the Iron Railroad of Ohio, one of the divisions or constituents of said Toledo, Cincinnati & St. Louis Railroad.

That during a part of the time covered by the receivership of E. E. Dwight and W. J. Craig, in the above entitled causes, to-wit: from about August 1st, 1883, to about August 1st, 1884, said Iron Railroad was also in the hands of said receivers respectively, during which period its net earnings, amounting, as your petitioner is informed, to about $41,133.91, were diverted from the purposes and uses of said Iron Railroad by said receivers, and expended by them in the operation and for the benefit of the other divisions of said Toledo, Cincinnati & St. Louis Railroad, then in their hands as receivers as aforesaid, including said divisions embraced in the above entitled causes.

That the determination of the exact amount of said divisions of said net earnings of said Iron Railroad, and a distribution of the liability to repay the same over the other divisions of said Toledo,
Cincinnati & St. Louis Railroad is within the reference hereto-
165 fore made to the Hon. J. D. Cox of Cincinnati, as master in the above-entitled causes, and that he has made a preliminary report finding that the whole amount thereof and of the claim thereby arising in behalf of said Iron Railroad down to the first day of April, 1884, to be $33,716.37.

And your petitioner says he is informed that said sum and claim was afterward, to-wit: down to the sale of said Iron Railroad, about August 1st, 1884, increased to about the sum of $41,133.91, as hereinbefore stated.

And your petitioner says it appears by the ratio of distribution adopted by said master for apportioning the general expenses of said Toledo, Cincinnati & St. Louis Railroad to the several divisions thereof in the hands of said receivers that the division embraced in the cause in this court aforesaid, numbered 7,706, should bear 30.05

per cent of the whole, and that the division embraced in the cause in this court aforesaid, numbered 7,814, should bear 29.85 per cent of the whole.

Wherefore, according to the sums and ratios aforesaid, there are due from said divisions respectively to said Iron Railroad, and should be paid into the Circuit Court of the United States for the Southern District of Ohio, Western Division, to the credit of said Iron Railroad in the pending causes numbered 3,579, in equity in the docket of said court (wherein said Craig was the last receiver of said Iron Railroad as aforesaid), from said cause numbered 7,706, in this court, the sum of $12,360.73, and from said cause numbered 7,814, in this court, the sum of $12,278.46.

And your petitioner prays that without prejudice to any other rights or remedies he may have in the premises an order may be entered in each of the above entitled causes and a decree herein directing the payment as aforesaid of said sums so due the Iron Railroad as aforesaid from said divisions embraced in the above entitled causes respectively out of the proceeds of the sales of said divisions heretofore made pursuant to the decree of this court therefor.

JOHN C. COOMBS,
Purchaser and Attorney, as aforesaid.

166 UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the petition and claim of the Iron Railroad Company, filed in said court on the 8th day of February, 1886, in the causes of the Central Trust Company of New York, *vs.* The Toledo, Delphos and Burlington Railroad Company, *et al.*, No. 7,706, and Edward F. Leonard *vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*, No. 7,814, as fully as the same remains on file in my office.

Witness my hand and seal of said court, at Indianapolis, in said district, this 19th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

"W" 2.

THE UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION. }

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the United States

of America, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of April, being also the 6th day of the month, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

Present, the Honorable George R. Sage, District Judge.

167 On Friday the 1st day of October, A.D. 1886, among the proceedings had were the following, to-wit:

The Central Trust Co., of New York, *Trustee*, &c.
vs.
The Toledo, C. & St. L. R.R. Co. *et al.* } *No. 3,554.*

The Central Trust Company of New York, *Trustee*, &c.
vs.
The Toledo, D. & B. R.R. Co., *et al.* } *No. 3,576.*

Central Trust Co., of New York, *Trustee*, &c.
vs.
The T., D. & Burlington R.R. Co., *et al.* } *No. 3,577.*

Central Trust Co., of New York, *Trustee*, &c.
vs.
The T., D. & B. R.R. Co., *et al.* } *No. 3,578.*

The Central Trust Co., of New York, *et al.*
vs.
The Iron R.R. Co., The Toledo, Delphos & Burlington R.R., *et al.* } *No. 3,579.*

These cases came on to be heard upon the motion of various creditors of the Toledo, Cincinnati & St. Louis Railroad Company and of the receivers for the settlement of questions arising upon indebtedness accrued by said receivers.

And the court being fully advised it is ordered, adjudged and decreed:

1st. That all and singular the indebtedness named by E. E. Dwight, Receiver of the Toledo, Cincinnati and St. Louis Railroad Co., and of the various divisions thereof in the several actions

168 brought in this circuit and in the Seventh Circuit, shall be recognized as the debts of the court the same as the indebtedness of William J. Craig, Receiver of the said railroad and all its divisions.

2nd. That all of the above indebtedness of the said receiver from the 1st day of August, 1883, up to about August 1st, 1884, shall be apportioned among the several divisions as follows:

Toledo Division (including Toledo Terminal)	24.19
Dayton Division	12.98
Dayton & Southeastern Division	32.67
Iron Railroad	1.98
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division	32.66
	100.

3rd. It is further ordered that these causes be referred to Wm. P. Fishback and A. J. Ricks, to take evidence and report to the court:

1st. Whether any of the said divisions that have been sold brought less than the amount of the proportion of the aforesaid indebtedness that such division, or divisions, will be required to pay of said debts, and the amount of such deficit.

2nd. That said masters shall, as soon as possible, report upon all the debts and claims paid and unpaid arising during the times aforesaid, and within 30 days after confirmation the purchaser of each of the said divisions shall pay into the hands of Noble C. Butler, Clerk of the United States Court for the Seventh Circuit, District of Indiana, the proportion hereinbefore specified, after deducting any amount that may have been paid by any purchaser for which such division or purchaser should be credited.

4th. The masters are further required to take evidence and report:

1st. As to whether any of the earnings of the Toledo, Cincinnati & St. Louis Railroad Company were, during the period commencing six months before the appointment of said Dwight, Receiver, and ending on the 1st day of August, 1884, diverted from the payment of labor and supplies, *i.e.*, from the payment of operating expenses.

169 2nd. As to whether any net earnings were ever made by said railroad company or by said receivers, or either of them, during the period aforesaid.

5th. The determination of the question of the allowance of claims heretofore filed for services rendered or supplies furnished after a period of six months prior to the appointment of said Dwight, Receiver, to-wit: August 1st, 1883, shall be reserved until the report of the masters as required herein.

6th. Nothing in this decree shall affect the question of rentals for equipment.

7th. It is further decreed that the percentage hereinbefore rendered to be paid by each of the said divisions is not final as between the said divisions.

8th. When the Masters, W. P. Fishback and A. J. Ricks, shall be ready to take testimony on any claim, they may respectively serve notice thereof on the claimant or his attorney of record; and the service on the parties representing the interests adverse to said claim may be made on Clarence Brown, attorney, at Toledo, Ohio.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify, that the foregoing entry is truly taken and correctly copied from the Journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, O., this 18th day of December, A.D. 1891. B. R. COWEN, *Clerk.*

By JANIE M. F. COWEN, *Deputy Clerk.*

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170 **"X" 2.**

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

May Term, 1886, October 2nd, A.D. 1886.

Before Honorable Walter Q. Gresham, and Honorable William A. Woods, Judges.

The following order and decree approved by the Honorable Walter Q. Gresham on the 1st day of October, 1886, was this day received and ordered to be entered of record:

Grenville D. Braman,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,672, Chancery.*

The Central Trust Company of New York, *et al.*,
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706, Chancery.*

Edward F. Leonard, *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814.*

These causes came on to be heard upon motion of various creditors of the Toledo, Cincinnati and St. Louis Railroad Company and of the receivers, for the settlement of questions arising upon indebtedness incurred by said receivers.

171 And the court being fully advised, it is ordered, adjudged and decreed:

1st. That all and singular the indebtedness incurred by E. E. Dwight, Receiver of the Toledo, Cincinnati and St. Louis Railroad Company and of the various divisions thereof in the several actions brought in this Circuit and in the Seventh Circuit shall be recognized as the debts of the court the same as the indebtedness of William J. Craig, Receiver of said railroad and all its divisions.

2nd. That all of the above indebtedness of the said receivers from the 1st day of August, 1883, up to August 1, 1884, shall be apportioned among the several divisions as follows:

Toledo Division,—including Toledo Terminals	24.19
Dayton Division	12.98
Dayton & Southeastern Division	32.67
Iron Railroad	1.98
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division	22.66

3rd. It is further ordered that these causes be referred to William P. Fishback and A. J. Ricks to take evidence and report to the court:

1st. Whether any of the said divisions that have been sold brought less than the proportion of the aforesaid indebtedness that such division or divisions will be required to pay of said debts, and the amount of such deficit.

2nd. That said masters shall, as soon as possible, report upon all the debts and claims, paid and unpaid, arising during the time aforesaid, and within thirty days after the confirmation the purchaser of each of said divisions shall pay into the hands of Noble C. Butler, Clerk of the United States Court for the Seventh Circuit, District of Indiana, the proportion hereinbefore specified, after deducting any amount that may have been paid by any purchaser for which such division or purchaser shall be credited.

4th. The said masters are further required to take evidence and report:

1st. As to whether any of the earnings of the Toledo, Cincinnati

and St. Louis Railroad Company were, during the period com-
172 mencing six months before the appointment of said Dwight, Receiver, and ending on the 1st day of August, 1884, diverted from the payment of labor and supplies, *i.e.*, from the payment of operating expenses.

2nd. As to whether any net earnings were ever made by said railroad company or said receiver, or either of them, during the period aforesaid.

5th. The determination of the question of the allowance of claims heretofore filed for purposes rendered or supplies furnished within a period of six months prior to the appointment of said Dwight, Receiver, to-wit, August 1, 1883, is reserved in the Sixth Circuit until the report of the masters as required herein.

6th. Nothing in this decree shall affect the question of rentals for equipment.

7th. It is further decreed that the percentage hereinbefore provided to be paid by each of the said divisions is not final as between the said divisions.

8th. When the Masters, W. P. Fishback and A. J. Ricks, shall be ready to take testimony on any claims, they may respectively serve notice thereof on the claimant or his attorney of record; and the service on the parties representing the interests adverse to said claim may be made to Clarence Brown, attorney, at Toledo, Ohio.

9th. Payment of the six months' claims accruing before the commencement of the Dwight receivership, will not be enforced until the questions reserved in the 5th paragraph of this decree shall have been determined in the Sixth Circuit.

UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order and decree entered in said court on the 2nd day of October, 1886, in the above entitled causes, as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

173 **"Z" 2.**

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

The Central Trust Company of New York,
vs.
The Toledo & St. Louis Railroad Company. } *No. 3,554.*

The Central Trust Company of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company.

To the Honorable Judges of the Circuit Court:

By a decree entered in the several suits above named, and in other suits between the same parties, pending in the several Districts of Ohio, Indiana and Illinois, the undersigned were appointed masters, to report upon the several points hereinafter stated, to-wit:

1st. Whether any of the divisions of the Toledo, Cincinnati & St. Louis Railroad that have been sold brought less than the amount of the proportion of the indebtedness (of the receiverships prior to the last day of August, A.D. 1884,) that such division or divisions may be required to pay of said debts and the amount of such deficit.

FINDING: Upon this inquiry we find that the several divisions of the said road that have been sold were purchased for the following, to-wit:

174

The Dayton Division	$125,000.00
The Iron Railroad Division	500,000.00
The Cincinnati Northern Division	200,000.00
The Dayton & Southeastern Division	500,000.00
The Cincinnati Division	20,000.00
The Toledo Division (and Terminal)	600,000.00
The St. Louis Division	901,000.00

The total indebtedness, disputed and undisputed, of the two receiverships, excepting car rentals, prior to the 1st day of August, 1884, amounted to the sum of $830,895.05, as made up upon the basis of the statement of Neil McKinnon, herewith filed and marked "Exhibit 'B'."

The amount is made up in part of claims still undetermined and disputed by the purchasers of the several divisions, and includes some liabilities created prior to the receiverships, but recognized by various

decrees and orders of the circuit courts of the several districts named, and therefore properly included in this report as part of the claims and liabilities asserted against the receiverships which may hereafter be ordered paid out of the funds arising from the several sales.

The proportion of said indebtedness which each division of the said road may be required to pay under the percentages established by the decree determined upon at Cincinnati, and entered in the various districts aforesaid, will be as follows, to-wit:

	%	
Toledo Division (and Terminal) . .	19.	$200,993.51
St. Louis Division	22.66	188,280.82
Dayton Division	12.98	107,850.18
Dayton & Southeastern Division . .	32.67	271,453.41
Iron Railroad	1.98	16,451.72
Cincinnati Division	1.36	11,300.17
Northern Division	4.16	34,565.24
	100.00%	830,895.05

Upon the above sums there will be a credit to the Dayton, Dayton & Southeastern, Iron, and Cincinnati Divisions for payments made by J. B. Foraker, aggregating $96,226.59, but we are unable from his report to fix the exact portion to be credited to each division. There is also to be credited to the Toledo and Toledo Terminal and St. Louis Divisions the sum of $194,256.58, which has been paid by the receivers of those divisions and by the purchasers. The account with each division would then stand as follows:

Price of Toledo Division (and Terminal) . .	$600,000.00
Its proportion of total indebtedness (excluding car rentals) as above described	200,993.51
No deficit.	
Price of St. Louis Division	$901,000.00
Its proportion of aforesaid debt	188,280.82
No deficit.	
Price of Dayton Division	$125,000.00
Its proportion of aforesaid debt	107,850.18
No deficit.	
Price of Dayton & Southeastern Division . .	$500,000.00
Its proportion of the aforesaid debt . . .	271,453.41
No deficit.	
Price of Iron Railroad Division	$500,000.00
Its proportion of aforesaid debt	16,451.72
No deficit.	

Price of Cincinnati Division	$20,000.00
Its proportion of the aforesaid debt . . .	11;300.17
No deficit.	
Price of Cincinnati Northern Division . . .	$200,000.00
Its proportion of the aforesaid debt . . .	34,565.23
No deficit.	

The above accounts are stated upon the basis of present liabilities fixed and estimated, but the actual result as to whether a deficit will be found to attach to any one division cannot be ascertained until the exact sum chargeable to such division for car rentals is ascertained. We are specially instructed *not to include such liabilities in this report.*

2nd. That said masters shall soon as possible report upon all the debts and claims, paid and unpaid, arising during the time aforesaid.

176 FINDING: The aggregate of all the debts and claims paid and unpaid, arising prior to August 1, 1884, including all possible liabilities so far as are disclosed by the records of the receiverships and the files of the Circuit Court at Indianapolis, is $830,895.05, as shown by the statement of Neil McKinnon, herewith submitted and marked "B," which represents the aggregate amount that may be required to be paid out of the proceeds, if said claims are finally approved by the court.

We also attach hereto and mark "A" a schedule of specific claim arranged in alphabetical order, showing period when and under what receivership claim accrued and whether the same is approved or unapproved. Separate reports have been filed as to many of these claims, giving full statement thereof, and these reports have been heretofore filed in the Circuit Court at Indianapolis, in compliance with an earlier order of that court. This schedule contains all claims filed and brought to our attention to this date. But in the column marked "unapproved" there are claims upon which evidence has been taken and will be included in a future report.

We add at the foot of the claim as examined and approved by the undersigned masters, a list of claims reported upon by Special Master J. D. Cox, under orders of reference made at Cincinnati and Indianapolis.

He has filed duplicate reports upon special claims considered by him, one in the Circuit Court of the United States for the District of Indiana, and one in the said court for the Southern District of Ohio.

We include the sums found due by said Cox, and submit his findings as to the amounts due, subject to such exceptions as *may have been, or may be, filed thereto by counsel.*

3rd. We are further required to report as to whether any of the earnings of the Toledo, Cincinnati and St. Louis Railroad Company were, during the period commencing six months before the appointment of said Dwight, Receiver, and ending on the first of August, 1884, diverted from the payment of labor and supplies, *i.e.*, the payment of operating expenses.

FINDING: We have examined the books and records of the receivers, and of the company in the possession of said receivers, personally, and with the aid of accounts, and find that there was
177 no diversion of the earnings of said road during the period named from the payment of operating expenses. Our investigations on this point fully confirm the reports heretofore made by Special Master J. D. Cox and the receivers, that no such diversion was made.

We are further ordered to report as to whether any net earnings were ever made by said railroad company, or by said receivers, or either of them, during the period aforesaid.

FINDING: We report in response to the above inquiry that the books examined, as above stated, show not only that no net earnings were ever made, but that there was a large deficit for the period named.

All of which is respectfully submitted.

WILLIAM P. FISHBACK and
A. J. RICKS,
Special Masters.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the report of Masters Fishback and Ricks, filed in said court on the 10th day of March, 1887, in the cause of the Central Trust Company of New York *vs.* The Toledo, Delphos & Burlington Railroad Company, *et al.*, and in the cause of Edward F. Leonard *vs.* The Toledo, Cincinnati & St. Louis Railroad Company *et al.*, No. 7,814, as fully as the same remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

178 **"A" 3.**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, on the first Tuesday of that month, being also the fifth day of that month, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

Present, the Honorable George R. Sage, District Judge.

Among the proceedings had were the following, to-wit:

Central Trust Company of New York,
vs.
Iron Railroad Company, *et al.* } *No. 3,579.*

Be it remembered, that heretofore, to-wit: on the 28th day of April, A.D. 1887, came John C. Coombs and Gustavus H. Wald, Esqs., Solicitors on the part of the first mortgage bondholders and purchasers of the Iron Railroad Company, and filed in the clerk's office of said court a petition for rehearing, which is clothed in the words and figures following, to-wit:

179 PETITION FOR REHEARING ON QUESTION OF IRON RAILROAD CLAIM.

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

Central Trust Company of New York,
vs.
Iron Railroad Company, *et al.* } *No. 3,579. In Equity.*

Motion on the part of the first mortgage bondholders and purchasers of the Iron Railroad for a rehearing on the question of the allowance of the claim of the Iron Railroad for net earnings while in the hands of the receiver, as against the receiver and the narrow gauge, mortgage, divisions of the Toledo, Cincinnati & St. Louis Railroad.

To the Honorable the Judges of the Circuit Court of the United States, Sitting in Equity within and for the Southern District of Ohio, Western Division:

Respectfully represent the first mortgage bondholders and the purchasers of the Iron Railroad in the foreclosure sale of the same in

the above entitled case, that during the time the said Iron Railroad was in the hands of the receiver in said case, and for a period of three months prior thereto, while Edward E. Dwight, a receiver appointed in certain bills in equity, filed by one Grenville D. Braman, a judgment creditor of said Toledo, Cincinnati & St. Louis Railroad, in the Circuit Court of the United States for the Southern District of Illinois, the District of Indiana, and the Northern District of Ohio, Western Division, claimed possession of said Iron Railroad under said creditor's bills as a part of said Toledo, Cincinnati & St. Louis Railroad, the net earnings of said Iron Railroad amounted to $41,-748.39; which sum was received and expended in part by said Receiver Dwight, and as to the remainder by said Receiver Craig, in the operation and for the benefit of certain other mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad; and that, not-
180 withstanding the facts and circumstances hereinafter mentioned, at a hearing had in the City of Cleveland in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, beginning on the sixth day of April, A.D. 1887, a certain judgment and decree was entered in said case, and in certain other cases hereinafter mentioned, rejecting the claim of your petitioners, in behalf of the Iron Railroad, to be reimbursed for and on account of its net earnings which had been received and applied by said receiver, as aforesaid, the reversal of which judgment and decree and the allowance of which claim are the objects of the rehearing prayed for in this petition, upon the following facts and showings, to-wit:

First: That said hearing in the City of Cleveland was held at a term of said Circuit Court of the United States for the Northern District of Ohio, Eastern Division, beginning upon the first Tuesday of April, A.D. 1887, at which time also a new term began of said Circuit Court of the United States for the Southern District of Ohio, Western Division, the prior term of said last-mentioned court, which began on the first Tuesday of February in said year, having already ended; that at said February term of said Circuit Court of the United States for the said Southern District of Ohio, Western Division, a hearing had been had upon exceptions theretofore filed to the final report of Jacob D. Cox, a master in said case, to whom the matter of said Iron Railroad's claim, among other things, had been referred by said court, and whose report found in favor of said claim; and said exceptions had been overruled and an entry made in said court in said February term thereof, establishing said claim; that said finding was afterwards adopted by Messrs. Fishback and Ricks, appointed masters in said cases for the foreclosure of the constituent mortgage divisions of the Toledo, Cincinnati & St. Louis Railroad, and reported to said Circuit Courts in which said cases were pending, all of which is more specifically hereinafter set forth; that no exceptions had been taken or filed at the time of said hearing in said City of Cleveland to such adoption or finding in favor of said claim,

nor was the time for filing such exceptions, if such adoption or finding by said Masters Fishback and Ricks was then subject to exceptions, expired; nor was there on any record or otherwise, at the time of said hearing in said City of Cleveland, any notice that any question as to the allowance of said claim would be raised or was then open; and said claim was rejected only on exceptions which the decree disallowing the same allows at that time to be filed.

Second: That at said hearing in City of Cleveland the court consisted of his Honor Judge Jackson, Judge of the Circuit Court
181 of the United States for the Sixth Circuit, his Honor Judge Gresham, Judge of the Circuit Court of the United States for the Seventh Circuit, and his Honor Judge Welker, Judge of the District Court of the United States for the Northern District of Ohio, sitting as a judge in said court; and that neither his Honor Judge Gresham, nor his ~~His~~ Honor Judge Welker, were reasonably to be presumed to be familiar with the records of the Circuit Court of the United States for the Southern District of Ohio, Western Division, upon which records principally the claim of said Iron Railroad rests; that neither this case nor, as your petitioners are informed and believe, any other cases in which said claim of said Iron Railroad is involved is pending in said Circuit Court of the United States for the Northern District of Ohio, Eastern Division; nor is the record of any of said cases, as your petitioners are informed, to be found in said court otherwise in said City of Cleveland, nor was any part of the same produced at said hearing, except such as counsel happened to be able to show from certified copies thereof in their possession without previous notice as to what might be pertinent or required in the premises.

Third: That the inception of the proceedings involved in said judgment and decree took place before Judge Drummond, formerly Judge of the Circuit Court of the United States for said Seventh Circuit, and some of the facts pertinent to the allowance or rejection of said claim were a part of the acts and doings in Chambers of said Judge Drummond, who has since retired and has been succeeded by his Honor Judge Gresham, who is not fairly to be presumed to be familiar with all the facts which transpired under the jurisdiction and administration of his said predecessor, as aforesaid.

Fourth: That by far the greater part of the record of the Circuit Court of the United States for the Southern District of Ohio, Western Division, where this case is pending, was made up under the direction and in accordance with the orders, judgments and decrees of the Honorable John Baxter, late judge of said circuit, since deceased, with whose acts and doings in the premises his Honor Judge Jackson, who succeeded Judge Baxter, is not fairly to be presumed to be familiar in the absence of said record.

Fifth: That because of the extent of said Toledo, Cincinnati & St. Louis Railroad, and the different jurisdictions necessarily invoked

in the administration of its affairs under the direction of the court and the complications arising from the different views which were entertained in respect to the effect of the inception of the pro-
182 ceedings by and in behalf of a judgment creditor and the separate foreclosure of the mortgages upon the several mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad, at different times and under separate bills, and the difference in the proceedings which were had in respect of so much of said road as ran from Toledo to East St. Louis as lay south of Delphos, Ohio, it is fairly to be apprehended that his Honor Judge Gresham, of the Seventh Circuit, and His Honor Judge Welker, of the Northern District of Ohio, might in consultation entertain and promulgate opinions consistent with the records of their own courts only, without taking into sufficient consideration the records of the Circuit Court of the United States for the Southern District of Ohio, Western Division, unless the same should be brought to their attention; and that it is also fairly to be apprehended that his Honor Judge Jackson because of his appointment after the greater part of said record, had been made up, and in the absence of said record and in the absence of the proper representation and aid from counsel (who were substantially unprovided with copies of said record, because not notified that any necessity therefor would arise), was not at said hearing sufficiently familiar with the facts of said record nor able to see to it that the same exerted the influence to which it was entitled in determining any judgment or decree affecting or based upon proceedings in respect to said Toledo, Cincinnati & St. Louis Railroad and the several mortgage divisions thereof in all of said courts; and that said claim of said Iron Railroad was more or less involved in, based upon and affected by all of the records of all of said proceedings, and especially the records in this case in the Circuit Court of the United States for the Southern District of Ohio, Western Division.

And your petitioners show, in respect of the records and proceedings hereinbefore referred to, as follows:

First: That the Toledo, Cincinnati & St. Louis Railroad Company was formed by the consolidation, mediate or immediate, of certain constituent companies, each of which had, prior to said consolidation, mortgaged its respective property.

Second: That said Iron Railroad, while an independent corporation, made a first mortgage of all its property, which has been foreclosed in the proceedings in this case; and that afterwards said road purported to be consolidated with a certain Toledo, Delphos and Burlington Railroad, which last-named corporation, by subsequent consolidation, became a part of said Toledo, Cincinnati & St. Louis Railroad Company.

183 Third: That the first proceedings pertinent to the matters herein contained was the filing of a certain bill in equity by one Grenville D. Braman, a judgment creditor of said Toledo, Cincin-

nati & St. Louis Railroad Company, in the Circuit Courts of the United States for the Southern District of Illinois, the District of Indiana, and the Northern District of Ohio, on or about August 1, A.D. 1883, under and in pursuance of which one Edward E. Dwight was appointed a receiver of all said property in so far as said courts had jurisdiction over the same.

Fourth: That at the hearing on application for a receiver under said bill, counsel for the first mortgage bondholders of the Iron Railroad was present, and was heard upon an intervening petition filed in all said courts in behalf of said bondholders, for the protection of the special equities pertinent to said Iron Railroad, and for the preservation of its separate rights, property, income and interests; and in pursuance thereof, in the decrees made upon said application for a receiver, power and authority were reserved "to any party interested in any one of the constituent companies out of which the consolidated company was formed, to apply to the court for a direction to the receiver to keep an account of the receipts and expenditures of such constituent company so as to preserve and secure any special equities which the court may find to exist in favor of such constituent company." Whereupon such application was immediately made in behalf of said first mortgage bondholders of said Iron Railroad, and thereupon the receiver was directed to keep and did keep a separate account of the earnings and expenses of said Iron Railroad so long as he assumed to hold possession thereof under and by virtue of his said appointment; and like application was made in behalf of the Cincinnati Northern Railway, a certain other constituent company of said Toledo, Cincinnati & St. Louis Railroad Company, and a like order in respect of said road was also made in said case.

Fifth: That afterwards, to-wit, on or about the fourteenth day of August, 1883, the trustee under the first mortgage of said Cincinnati Northern Railway, to-wit: The Central Trust Company of New York, filed in the Circuit Court of the United States for the Southern District of Ohio, Western Division, a bill to foreclose said mortgage, making said Grenville D. Braman and said Toledo, Cincinnati & St. Louis Railroad Company and other parties defendant thereto; which cause is numbered 3,554 on the equity docket of said court.

Sixth: That thereupon an application was made by said Receiver Dwight to said Circuit Court of the United States for the
184 Southern District of Illinois, for a restraining order and injunction upon said Central Trust Company of New York, to enjoin the prosecution of said foreclosure suit begun in said Circuit Court of the United States for said Southern District of Ohio, or any application for any receiver under the same.

Seventh: That said Toledo, Cincinnati and St. Louis Railroad Company, and said Grenville D. Braman, both appeared in said

foreclosure suit in said Circuit Court of the United States for the Southern District of Ohio, Western Division, and filed their several pleas to said bill, setting up the appointment of said Dwight as receiver by said Circuit Court of the United States in the Southern District of Illinois, the District of Indiana, and the Northern District of Ohio, Western Division.

Eighth: That afterwards, to-wit: on the 29th day of September, A.D. 1883, said cause of Grenville D. Braman against said Toledo, Cincinnati and St. Louis Railroad Company, and others, then pending as aforesaid, came on to be heard in the Circuit Court of the United States for the Northern District of Ohio, Western Division, before his Honor Judge Baxter, Judge of the Circuit Court of the United States for the Seventh Circuit, upon an application of said Central Trust Company of New York for leave to prosecute said suit in equity, to foreclose said mortgage against said Cincinnati Northern Railway Company and others in said Circuit Court of the United States in said Southern District of Ohio, Western Division, and to set aside the order theretofore made in said suit brought by said Braman appointing said Dwight a receiver as aforesaid. And thereupon it was ordered in said suit, among other things, as follows, to-wit:

"And the court, being fully advised in the premises, now grants leave to said Central Trust Company to prosecute said suit in the Southern District of Ohio. And the court further orders that the order heretofore made in this cause, appointing a receiver for said property, be and the same is hereby ordered to stand until October 20, 1883, and the said Receiver, E. E. Dwight, is hereby ordered to be discharged on said 20th day of October, and to redeliver on that day the possession of the Toledo, Cincinnati & St. Louis Railroad, so far as the same is situated within the State of Ohio, together with all the rolling stock, material, supplies and all other property in his possession belonging to said company, unto the defendant, the Toledo, Cincinnati & St. Louis Railroad Company, such delivery to be made and completed on October 20, 1883. And said receiver shall pay any money in his possession into court, and file his account at that date."

185 Ninth: That at the time of the making and entry of said order, it was understood by all parties in interest, upon the announcement in effect by his Honor Judge Baxter, that the same appeared to be proper and necessary; that foreclosure proceedings would be begun on bill to be filed on said 20th day of October by said Central Trust Company, who was the trustee in all of the mortgages made by the several mortgage divisions of the said Toledo, Cincinnati & St. Louis Railroad (lying within the State of Ohio) for the purpose of foreclosing the mortgages on said Ohio Division of said road. But that as to so much of said railroad as lay in the State of Indiana and Illinois, his Honor Judge Drummond reserved any expression of his

determination as to what proceeding should be had in the Seventh Circuit of the United States.

Tenth: That afterwards, to-wit: on said 20th day of October aforesaid, said Central Trust Company of New York filed its several bills of foreclosure to foreclose said mortgages upon said several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad lying within said State of Ohio, in addition to the bill already filed as aforesaid to foreclose said mortgage on said Cincinnati Northern Railway Division, to-wit: a bill to foreclose the mortgage on the Cincinnati Railroad Division, so-called; a bill to foreclose the mortgage on the Dayton Railroad Division, so-called; a bill to foreclose the mortgage on the Dayton and Southeastern Railroad Division, so-called; and a bill to foreclose the mortgage on the Iron Railroad Division, so-called, which causes were numbered on the equity docket in said court 3,576, 3,577, 3,578 and 3,579.

Eleventh: That said causes, coming on immediately on the application for the appointment of a receiver of the property sought to be foreclosed in each of said bills respectively, it was early announced in substance by his Honor Judge Baxter, holding said court, that he should appoint the same man receiver of said several divisions, for the purpose of securing harmony of operation, but that such receiver should be in effect a separate receiver of each division, and William J. Craig was appointed such receiver in each of said cases.

Twelfth: That in the bill to foreclose said mortgage upon said Iron Railroad Division, no other property was mentioned or described than that covered by the several and separate mortgage of said Iron Railroad; and no receiver was asked for in said case except of said property; and in the decree appointing said Craig receiver of said property, it was provided among other things as
186 follows: "That William J. Craig be, and he hereby is, appointed receiver of all and singular the premises, property, money and assets described in the said bill of complaint in this suit * * * to take possession of, maintain and operate the said railroad, premises and property described in said bill of complaint herein, being all and singular the right of way and line of railroad of the said Iron Railroad Company as the same was on the first day of August, 1881, or has since been constructed or acquired between the Ohio River, in Upper Township, in Lawrence County, Ohio, and the South Line of Jackson County in said State, including its line from Ironton to Centre Station; its line from Ironton to Sarah Furnace; its line from Aetna Station to Ellisonville, also the Bartels branches, all in said Lawrence County, together with all and singular the right of way, road-bed then or since made, its tracks then or since then laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine houses, machine shops, buildings, erections in any way then or since then appertaining unto said described line of railroad, together with all the

engines, cars, machinery, supplies, tools and fixtures then or thereafter held, owned or acquired by said Iron Railroad Company for use in connection with its line of railroad aforesaid, and all its depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights then or thereafter owned by the said Iron Railroad Company in connection with its line of railroad aforesaid, together with all and singular the powers and franchises thereto belonging, and the tolls, incomes and revenues to be levied or derived therefrom, as fully described in said bill of complaint filed in this suit, reference to which for greater certainty is now had and made. And said receiver is hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for and operate said railroad, premises and property, to make reports of his acts and doings to this court every two months at least, or oftener if required thereto by the court, to collect and receive the tolls, issues, rents and profits of said premises, railroad and property, and out of the same to make such repairs as may be necessary to preserve and keep the same in safe and proper condition. And said receiver is hereby authorized to operate said railroad in connection with any other or others of the constituent roads of the said Toledo, Cincinnati & St. Louis Railroad Company, of which he may be appointed receiver; but is hereby directed to keep the accounts of the earnings, incomes, issues, rents, profits and expenditures of the said Iron Railroad Company separate from the earnings, issues, rents, profits, income and expenditures of the other of the constituent roads of the said Toledo, Cincinnati & St. Louis
187 Railroad Company. And said defendants, the said Iron Railroad Company, and the Toledo, Delphos and Burlington Railroad Company, and the Toledo, Cincinnati and St. Louis Railroad Company, are hereby ordered and directed to deliver to the said William J. Craig, Receiver, possession and control of all the property, rights, franchises, privileges and assets of every kind above described. And it is further ordered that said receiver make and file a true inventory of all cars, engines, rolling stock, material and supplies above described, as well as of all other personal property coming into his possession by virtue of this order. And said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads so that the receipts therefrom may be apportioned as the court may hereafter direct."

And thereupon said William J. Craig took possession of all and singular said property as described in said mortgage, bill of complaint and decree; and on the 23rd day of October, 1883, filed his separate bond in said case in the sum of $10,000.00, the condition whereof is that he "shall faithfully account for what comes to his hands or control as such receiver," etc. And afterwards, to-wit, on the 1st day of December, 1883, he filed in said case his inventories

of rolling stock, station furniture, tools, materials, machines, supplies, etc., of said Iron Railroad, which came to his possession as such receiver.

Thirteenth: That, as appears by the evidence taken in this case before the Honorable J. D. Cox, Master, as hereinafter mentioned, at the time of said Craig's appointment by said court as aforesaid, application was made to said court in behalf of your petitioners by the counsel of said Central Trust Company, of New York, complainant in said case, that the receiver be compelled to keep the funds (of said Iron Railroad) separate; and it was urged upon said court that a separate account would only inform your petitioners how much had been stolen from them. The court replied that to require the receiver to keep a separate bank account for the Iron Railroad would be too burdensome, but that upon the final hearing of the cause, if it appeared by the accounts that any part of the money had been taken for the benefit of another by the receiver, it would be ordered to be restored, and if the receiver did not have it, it should be taken out of the proceeds of sale.

Fourteenth: That said William J. Craig gave a several and separate bond in each of said other several cases in which he was appointed receiver as aforesaid for his separate undertaking in respect of
188 his said appointment in each of said cases, and filed separate inventories, as your petitioners are informed, in each of said cases.

Fifteenth: That at the time of the appointment of said Craig, Receiver in this case, as aforesaid, no bill or suit had been brought by said Grenville D. Braman, or was pending in said Circuit Court of the United States for the Southern District of Ohio, in the Western Division thereof, which court alone of the courts of the United States had property jurisdiction of said Iron Railroad; nor was any such bill ever filed in said court at any time thereafterwards; nor was said Craig directed in said suit for said foreclosure against said Iron Railroad Company, nor in any of the other of said foreclosure suits in said Circuit Court of the United States for the Southern District of Ohio, Western Division, to succeed to or otherwise take from said Receiver Dwight any of the property or estate of which said Dwight was or may have claimed that he had been appointed a receiver in said case brought by said Grenville D. Braman; nor was said Dwight, in any of said cases of foreclosure, ordered to make any delivery of any of the property therein sought to be foreclosed to said Receiver Craig, or otherwise recognized by said court as having possession thereof, but said several companies were ordered and directed, as in the case of the Iron Railroad Company herein set forth, to deliver said mortgaged property to said receiver as if the same were in the hands or possession of said constituent or consolidated companies, mortgagors and successors of mortgages under said mortgages; nor was there ever in any of said cases in said Circuit

Court of the United States for the Southern District of Ohio, Western Division, any order, judgment or decree extending or purporting to extend said alleged Dwight receivership over said mortgagee's interests in said several mortgage divisions, or continuing the same in said Craig, Receiver, as aforesaid.

Sixteenth: That said Grenville D. Braman, said Iron Railroad Company, said Toledo, Delphos and Burlington Railroad Company, and said Toledo, Cincinnati & St. Louis Railroad Company appear in this case only as parties defendant and as such filed their appearances herein, but made or filed no answer or other pleadings to the allegations of said bill, so that all said allegations were taken to be confessed, as hereinafter mentioned.

Seventeenth: That afterwards, to-wit, on the 29th day of January, 1884, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, an application was made and filed in behalf of the plaintiff in said suit brought by said
189 Braman for leave to amend said bill, so that the receivership originally created under said bill, and notwithstanding the order to dismiss said receiver made upon the 29th day of September, A.D. 1883, as aforesaid, might be revived or continued so as to cover any property belonging to said consolidated Toledo, Cincinnati & St. Louis Railroad Company and not included in any of the mortgages upon the several mortgage divisions of said constituent companies, and such amendment was allowed, and an order in accordance with the purpose thereof as aforesaid was made in said court in said Northern District of Ohio, Western Division.

Eighteenth: Afterwards, to-wit, on the 12th day of February, A.D. 1884, it was ordered, adjudged and decreed in said Circuit Court of the United States for the Southern District of Ohio, Western Division, that said bill of complaint in this case of said foreclosure of said mortgage of said Iron Railroad be taken *pro confesso*; and subsequently on the 31st day of March, A.D. 1884, a decree for the sale of said Iron Railroad, in pursuance of said foreclosure proceedings, was made in said court, in which among other things said court found relating to the several consolidations hereinbefore mentioned, subsequent to the date of said mortgage of said Iron Railroad, as follows: "And the court finds that the several consolidations were subject and subordinate to the rights of the holders of the bonds secured by the several mortgages hereinbefore mentioned and without prejudice to the right to sell the said property of said Iron Railroad Company by virtue of the said mortgage of August 1, 1881, and upon default in performance of the condition of said mortgage as provided in said decree, said court ordered, adjudged and decreed that said Iron Railroad and said subsequent consolidated companies and said Grenville D. Braman, and incumbrances subsequent to said first mortgage, be forever barred and foreclosed" of, in and to said mortgage premises, property, rights, assets and fran-

chises, and of every part or parcel thereof, described or embraced in said first mortgage, made by said Iron Railroad Company on said first day of August, 1881; " . . . . . : which said mortgaged premises, property, assets, rights and franchises are hereinbefore and in said bill of complaint, to which reference is now had for that purpose, fully described, including all property embraced within the terms of said mortgage acquired by said Iron Railroad Company since the date of said mortgage, and owned by it at the time of the consolidation with the said Toledo, Delphos and Burlington Railroad Company;" which was the property mentioned and described which was ordered to be sold by said judgment and decree, and in said order of judgment and decree said receiver of said Iron Rail-
190 road was, among other things, required to transfer and convey to the purchaser or purchasers at said sale "all property and rights which he may have acquired in the administration of said trust."

Nineteenth: Afterwards, to-wit: on the first day of April, A. D. 1884, in said Circuit Court of the United States for the said Southern District of Ohio, Western Division, an order of reference was entered in all said cases hereinbefore mentioned pending in said court, to-wit: Nos. 3,554, 3,576, 3,577, 3,578 and 3,579, by the Hon. John Baxter, Judge of said Circuit Court, to Jacob D. Cox, Esq., as Special Master, to inquire and state to the court, among other things, as follows:

"And it is further ordered that the master, in making the inquiries and statements herein directed, consider and treat the several mortgages under which the receiver has been appointed as embracing and representing distinct and independent interests, and that the receiver render and the master state such accounts as may be necessary. That said master inquire and state what, if anything, may be due from the one interest or estate to the other, and what proportion each should bear in respect of any charges and liabilities in the premises and to inquire and state to the court what property, real, personal and mixed, is covered by said several mortgages."

And your petitioners are informed that like orders were entered at or about the same time in all the courts in the Sixth and Seventh Circuit of the United States in which any proceedings were then pending, either under said bill filed by said Grenville D. Braman or in bills for the foreclosure of any mortgage division of said Toledo, Cincinnati & St. Louis Railroad.

Twentieth: That said Special Master, Jacob D. Cox, immediately began his hearing under said order of reference, and made report to the courts out of which said orders had issued; which said report was filed in said Circuit Court of the United States for the Southern District of Ohio, Western Division, on the 26th day of June, A.D. 1884, and at or about the same time in all of the other courts wherein any proceedings touching the premises as aforesaid were

pending; to which report your petitioners crave leave to refer and which report contains, among other things, the following:

P. 10. "The Iron Railroad is a standard gauge road, of 4 feet
191 8½ inches gauge, and is the only exception in the whole system, all of the other constituent roads being of the narrow or three feet gauge."

P. 26. "The receiver having, under orders of the court, kept his accounts in such a manner as to show the earnings and expenses of the several divisions of the road separately, since November 1st, 1883, an analysis of such accounts shows an excess of expenses over income on all divisions of the road, except the Iron Railroad, as stated below. The account of the Iron Railroad shows a balance of income over expenses, amounting at April 1st to the sum of $33,-716.37 as above noted.

EXCESS OF EXPENDITURES OVER INCOME.

Toledo Terminal .	Nov. 1, '83, to Apr. 1, '84,	$3,259.79
Toledo Division .	" "	104,585.04
St. Louis Division .	" "	61,682.50
Dayton Division .	" "	15,222.60
Dayton & Southeastern Division .	" "	38,633.79
Cincinnati Division .	" "	4,652.02
Cincinnati Northern Division	" "	21,098.18
On all Divisions, Aug. 1, '83, to November 1, '83, except the Cincinnati Northern . . .		26,583.21
Cincinnati Northern Ry., Aug. 1, '83, to Nov. 1, '83,		3,355.05
Total of such excess to April 1, 1884 . .		$279,072.18
The receiver has expended for corporation debts ordered to be paid, above the sum collected from the corporation assets		$58,915,62
Receiver's certificates issued for debts on account of Frankfort & State Line Railroad . . .		113,941.89
Paid on account of Toledo Terminal Trust . .		86.75
Receiver's certificates issued for rights of way on Cincinnati Northern Railway		25,176.20
Taxes yet to be paid (see below p. 52) . . .		
Rentals upon rolling stock		403,997.00
Probable deficit for April, May and June . .		100,000.00
Amount brought over from last page . . .		279,072.18
Total		981,189.64

being the same amount before reported as the excess of receiver's liabilities over assets on July 31, 1884. The distribution of this

192 indebtedness to the several divisions of the railroad which the master finds to be equitable is hereinafter reported."

P. 50. "In pursuance of the orders of the court, the receiver has for some months kept the operating expenses of the road separately distributed to the several divisions, as such expenses were incurred. In doing this he kept separate accounts of all expenses which were properly local, under the customary rules of railroad accounting; and the 'general expenses,' which could not be treated as local, he divided upon a scale of percentage based chiefly upon the miles in length of the several parts of the road, but modified by the extra value of the property and the earning capacity of the terminals of the line at Toledo, and at Cincinnati. On recommendation of the receiver, the court has authorized the allowance of an extra share of the earnings (known as an 'arbitrary' among the railroad accountants) to these terminals, and in the distribution of general expenses, the receiver added to the proportion of these terminals on a mileage basis, an addition proportionate to this 'arbitrary.' The master finds that this division by the receiver is a fair one, and that it would be impracticable to change his accounts by altering it."

P. 54. "The division of the amount paid by the receiver upon corporation debts in excess of his receipts from corporation assets, the master finds should be done upon the basis of the relative expenses of the several roads, as that amount (in the impossibility of tracing its items) is presumably made up by the aggregate expense of the divisions of the road in the usual proportions. It included pay-rolls in part, and these were due upon the Iron Road as well as the others. The master therefore states the distribution of this payment of $58,915.62 (see page 27) in the proportions of the ordinary expenses of said divisions (exclusive of car rentals), as follows:

DIVISIONS.	PER CENT.	AMOUNTS.
Toledo Terminal	1.63	$960.32
Toledo Division	26.81	15,795.28
Dayton Division	10.87	6,404.13
Dayton & Southeastern Division	24.08	14,186.88
Iron Railroad	2.32	1,366.84
Cincinnati Division	1.76	1,036.92
Cincinnati Northern Railway	10.00	5,891.56
St. Louis Division	22.53	13,273.69
Total	100.00	$58,915.62

193 "The estimated deficit in the receiver's earnings for April, May and June, of $100,000.00, being based upon separate accounts kept, and the exact application of each division's earnings to its own expenses, the master finds, should be divided in the proportion of the deficits which have already accrued since that mode of accounting was adopted under the order of the court. In this case, the Iron Road

will have a probable surplus which the receiver will have to return to it, and it does not therefore appear in this list of deficits:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal	1.58	1,580.00
Toledo Division	30.05	3,005.00
Dayton Division	7.36	7,360.00
D. & Southeastern Division	18.70	18,700.00
Cincinnati Division	2.25	2,250.00
Cincinnati Northern Railway	10.21	10,210.00
St. Louis Division	29.85	29,850.00
Total	100.00	$100,000.00

"During the first three months of the receivership, and before the separate keeping of accounts of the divisions were completely in operation, there was a deficit of $26,583.21 upon the divisions, excluding the Iron Railroad and the Cincinnati Northern (see p. 20). This has to be divided among the divisions on which it accrued, and the master finds that it should be in the proportion of their ordinary expenses to each other, on the same principle as was adopted in regard to the division of $58,915.62 above, but reducing the number of parties among whom it is divided, as follows:

DIVISIONS.	PER CENT.	AMOUNT.
Toledo Terminal Division	1.85	491.79
Toledo Division	30.58	8,129.15
Dayton Division	12.40	3,296.32
Dayton & Southeastern Division	27.46	7,299.75
Cincinnati Division	2.01	534.32
St. Louis Division	25.70	6,831.88
Total	100.00	$26,583.21"

Twenty-first: Afterwards, to-wit: on the 28th day of June, A. D. 1884, said Iron Railroad was sold in pursuance of said decree of foreclosure and sale to John C. Coombs, as Trustee, for the sum of $500,000 00, by Simeon Harris, who had been theretofore appointed by said Circuit Court of the United States for the
194 Southern District of Ohio, Western Division, a Special Master Commissioner to make said sale, and who, on the same date, reported said sale to said court, on which day a motion was filed by the counsel for said Central Trust Company of New York for the confirmation of said sale.

Twenty-second: That afterwards, to-wit: on the 18th day of July, A.D. 1884, in the Circuit Court of the United States for the Southern District of Ohio, Western Division, said case came on to be heard upon said application for the confirmation of said sale before the Honorable Stanley Matthews, Justice of the Supreme Court,

and said sale was duly confirmed; and said decree confirming said sale contained, among other things, the following:

"And it appearing to the court by the report of Jacob D. Cox, Esq., Special Master heretofore appointed in this cause, that the earnings of said Iron Railroad, during the time the same has been operated by the receiver appointed in this cause, are largely in excess of the expenditures incurred by said receiver in operating the same, the court finds it unnecessary to require the amount ordered by this court in the decree of sale hereinbefore entered to be paid in cash at this time."

And in the decrees entered at or about the same time in and by said court in affirmance of the sales of certain other divisions of said Toledo, Cincinnati & St. Louis Railroad, to-wit, the Cincinnati Division, the Dayton Division, and the Dayton and Southeastern Division, which were sold in like proceedings on the same day as said Iron Railroad, it was expressly ordered, adjudged and decreed in substance, on account of the earnings of said Iron Railroad which had been used by the receiver for the benefit of the other mortgage divisions of said Toledo, Cincinnati & St. Louis R. R., that the amount of the money which would otherwise have been required to be paid into court at that time by the purchaser of said Iron Railroad, should be furnished one-fifth thereof by the purchasers of said Cincinnati Division and two-fifths thereof by the purchasers of each said Dayton Division and said Dayton and Southeastern Division respectively.

Twenty-third: That afterwards, to-wit: on the 26th day of July, A.D. 1884. said Special Master Jacob D. Cox, in pursuance of a direction thereto of said Circuit Court of the United States for the Southern District of Ohio, Western Division, filed in said court and, as your petitioners are informed, in the other courts and cases wherein any of the foreclosure proceedings hereinbefore mentioned were pending, a second report containing an analysis of the
195 receiver's indebtedness so as to show just what proportions of the same was uncontested, and the proportionate parts of the same which, upon the ratios above reported, should be borne by the said several mortgage divisions of said Toledo, Cincinnati and St. Louis R. R.; which report, among other things, contained the following, to-wit:

"Bringing together the four classes of items above enumerated and tabulating them we shall have the total amount of this undisputed indebtedness, and the amount to be contributed by each division of the road. The sum of $33,716.37 before reported to be due to the Iron Railroad from the other divisions is included in their deficits and is part of the undisputed indebtedness of the receiver, subject, however, to be reduced by the proportion of car rentals, &c., charged that road, if the same shall be approved by the court as reported in a former report of the master. The amount of

$1,366.84 charged the Iron Railroad in table 4 above as its part of corporation debts paid by receiver will be also offset against its credits in this manner;" said report contained four tables showing the undisputed indebtedness of the several mortgage divisions of the Toledo, Cincinnati & St. Louis Railroad down to April 1, A.D. 1885.

Twenty-fourth: That afterwards, to-wit: on the 29th day of July, A.D. 1884, in the Circuit Court of the United States for the Southern District of Ohio, Western Division, before the Honorable Stanley Matthews, Justice of the Supreme Court, and the Hon. George R. Sage, District Judge holding said court, said causes, to-wit: Nos. 3,554, 3,576, 3,577, 3,578 and 3,579, came on further to be heard upon said report of said Master J. D. Cox, filed therein on the 29th day of said July, A.D. 1884, as aforesaid; and thereupon said court proceeded to take into account certain court expenses, and counsel, receivers' and commissioners' charges for services incurred in said cases, and provided for the payment thereof and the distribution of said burdens over said divisions, and for the payment of so much thereof as pertained to the Iron Railroad out of any funds which then were or might be to its credit in said court, but again required no money to be paid into court on account of said charges by said purchasers of said Iron Railroad; and said court further then and there considered said second report of said J. D. Cox, and ascertained the amount of money necessary to pay the undisputed indebtedness of the said several mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad, which had been theretofore sold as hereinbefore mentioned, as shown in tables contained in said second report, and rejected one only of said 196 tables, to-wit: the third table therein contained, which provided for the payment of $26,583.21 deficit, incurred by said Receiver Dwight in operating said roads under said judgment creditor's bill, it not having then been determined in said Circuit Court of the United States for the Southern District of Ohio, Western Division, that any indebtedness of said Dwight should be recognized or paid. And said court confirmed all of the other undisputed indebtedness of said divisions so sold as aforesaid as found in said report. And said report expressly included as a part of said undisputed indebtedness, as hereinbefore quoted, the indebtedness as stated in said report of said other divisions to said Iron Railroad for and on account of the net earnings of said Iron Railroad, diverted for the benefit of said other divisions, amounting at the date to which said report brought down said account, to-wit: April 1, 1884, to $33,716.37; and the order of distribution, judgment and decree then and there passed by said court contains the following: "And the court further finds that the undisputed indebtedness of said William J. Craig, incurred as receiver in causes numbered 3,576, 3,577, 3,578 and 3,579 of the above entitled causes, amounts

to the sum of $109,813.13, of which amount the sum of $7,938.94 is due by said receiver in cause number 3,576 of the above-entitled causes, and the sum of $28,986.73 is due by him in cause number 3,577 of the above entitled causes, and the sum of $71,520.67 is due by him in cause number 3,578 of the above-entitled causes, and $1,366.84 is due by him in cause number 3,579 of the above-entitled causes, it is therefore hereby further ordered, adjudged and decreed that the respective purchasers in causes number 3,576, 3,577 and 3,578 of the above-entitled causes, to-wit: the purchasers of what is known as the Cincinnati Division, and the purchasers of what is known as the Dayton Division, and the purchasers of what is known as the Southeastern Division, be and they hereby are directed to pay within twenty days of the entry of this decree to J. B. Foraker, Esq., or upon his order as attorney for said William J. Craig, sufficient money to pay in full the amount of said undisputed indebtedness of said receiver, in said several cases respectively, as the same is hereinbefore respectively found and set forth." Which undisputed indebtedness of each of said divisions was made up, as shown by said report, by including in the items thereof its share and proportion of the ascertained amount of the Iron Railroad's claim. And also by including, in the same proportions, anticipated deficit which must necessarily arise in part from an increase of said Iron Railroad's claim for the remainder of the whole period covered by said receivership.

And your petitioners have been informed that said divisions complied with said order so far as to furnish said sums to the
197 amount required of them as therein provided, except that it appearing that said Cincinnati Division and said Dayton Division might not have sold for sufficient to pay their indebtedness in full, they were subsequently in said decree permitted to pay into said court but 50 per cent of the amount of their said indebtedness, as aforesaid; wherefore, there should now for a long time have been in said Circuit Court of the United States for the Southern District of Ohio, Western Division, a large sum already paid by said other divisions as aforesaid, for and on account of said claim of said Iron Railroad, to-wit, 18 71-100 per cent of the $33,716.37, the amount of said claim of said Iron Railroad, as brought down to April 1, A.D. 1883, as aforesaid, paid in by said Dayton and Southeastern Division; 7 36-100 per cent of the amount of said claim paid in by Dayton Division; and 2 25-100 per cent of the amount of said claim paid in by said Cincinnati Division; but for the fact, as your petitioners have been informed, that said sums so furnished were not credited or applied by said Foraker to said claim, but were allowed by him to be applied on account of certain indebtedness common to some or all of said divisions paying the same as aforesaid, and other mortgage divisions with said mortgage divisions lying south of Delphos, and so sold as aforesaid, there ought of ne-

cessity to be paid back to said last-named divisions or to their credit, and so for the benefit of said Iron Railroad, said sums already so furnished and paid by said other divisions for and on account of their respective indebtedness to said Iron Railroad, as aforesaid.

Twenty-fifth: That both said first report of said Master, J. D. Cox, and said second report of said master were filed in the courts and cases and at the times aforesaid; that in no court in which either of said reports was filed was there ever any exceptions taken, filed, claimed or alleged to the severation of the interests, rights, duties and liabilities of the several mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad Company, as therein found and reported; nor to said claim of said Iron Railroad, or the validity thereof, and the percentage and proportion thereof which should be borne and paid by the other mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad, according to the tables applicable and applied thereto in said reports; nor to any of the percentages or proportions of the liabilities, obligations or benefits to which each, any or all of said divisions were therein found to be subject or entitled; except that exceptions were filed thereto in behalf of your petitioners to so much of said report as found said Iron Railroad property in any respects liable for or on account of the narrow-gauge equipment;

198 nor was there ever any appeal claimed or allowed from any of the orders, judgments or decrees hereinbefore mentioned, based upon or made in pursuance of said reports, and the distribution and proportion of the liabilities and burdens and the claims therein found and reported: that said Central Trust Company, of New York, complainant in all said bills in said Southern District of Ohio, Western Division, was also a party defendant in said bill brought by said Grenville D. Braman, as hereinbefore stated, and was also joint or sole trustees under all of the mortgages made by each and all of the constituent companies or mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad, and brought bills to foreclose the first mortgage on every one of said divisions, and said trustee at all times had notice and was present by counsel when all and singular the acts and doings in the premises occurred whereby said claim of said Iron Railroad was created and the validity and undisputed character thereof and the proportions in which the same should be borne and paid by said other mortgage divisions were determined, all as hereinbefore stated; and other and separate counsel for the bondholders of all of the mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad, respectively, have had notice of and attended as they saw fit to the determination of said claims, as aforesaid, and the hearing before said Master, J. D. Cox, in relation thereto.

And your petitioner, the purchaser of said road, purchased the same as trustee for the first mortgage bondholders, also petitioners herein, both of whom claim that in their conduct in all and singular

the proceedings herein mentioned and in making said purchase and consummating the same, as aforesaid, they of right relied upon the records, reports and proceedings of and in said courts prior to that time, as hereinbefore set forth, alike in the determination of the several and seperate rights and interests of said Iron Railroad and the vesting of said claim in them as bondholders purchasing the same, as provided in the decrees hereinbefore mentioned in that behalf, as well as in all other matters in the premises; and submit that said proceedings and their said rights and interests so vested, acquired and fixed were at the time of said hearing in said City of Cleveland unreversed and indefeasable.

Twenty-sixth: That afterwards, to-wit: on or about the 8th day of August, A.D. 1884, an application was made in this case to establish a certain lien upon said mortgaged premises in behalf of certain train contractors by the name of Newman and Spanner, and that said matter came on for hearing before his Honor John Baxter,
199 Judge of said court, who, still in pursuance of the rights and interests of said Iron Railroad in and to its said claim as theretofore determined as aforesaid, though establishing and allowing said lien, nevertheless provided that the same should be paid out of the fund due the Iron Railroad, when the same should be paid, from the other divisions of said Toledo, Cincinnati & St. Louis Railroad, as hereinbefore mentioned and set forth; which finding and decree of Judge Baxter was entered of record on February 3, 1886.

Twenty-seventh: That afterwards, to-wit: on the seventh day of January, A.D. 1886, the said Special Master Cox filed his third and final report in said Circuit Court of the United States for the Southern District of Ohio, Western Division, and at or about the same time in the Circuit Court of the United States for the District of Indiana; which said report brought down the amount of said claim of the Iron Railroad to Nov. 1, 1884, or so as to cover the entire period of said receiverships; but always upon the same basis, considerations, proportions and tables theretofore adopted by said master in his said first and second reports and approved by the court, as aforesaid, in which said first and second reports said claims as brought down to the first day of April, 1884, said master had found amounted at that date to $33,716.37, as above shown, and said third and final report bringing said account down to November first, as aforesaid, contained, among other things, the following:

"The gross earnings and expenses of the Iron Railroad Division down to November 1, 1884, as shown by the receivers' books, are as follows:

	EARNINGS.	EXPENSES.
Dwight's Receivership	$24,681.45	$7,113.53
Craig's Receivership, Nov. 1, 1883, to July 19, 1884, the time the road was delivered to purchasers	47,179.12	23,632.36

Net earnings, Dwight's Receivership . .	17,567.92
Net earnings, Craig's Receivership . .	23,546.76
Total net	41,114.68

"To this must be added the sum of $633.71 mentioned above."

"As to the eighth proposition submitted by the said counsel, the master finds as matter of fact that the whole earnings of the
200 system and all parts of it, including the Iron Railroad Division, were used by the receivers to pay current expenses of operating the whole system, keeping the accounts of the several divisions separate under the order of the court, as before stated.

"The master finds as matter of law, that, under the interlocutory decrees entered in these cases, the excess of earnings over expenses in the case of the Iron Railroad Division so used by the receivers for operating the other divisions of the road and system ought to be a first charge against the fund arising from the sale of such other divisions, and to be paid out of such funds into the hands of the receiver or into the registry of the court, to be applied to the payment *pro tanto* of the senior lien upon the Iron Railroad next after the receiver's debt upon such Iron Railroad Division, if any there be."

Twenty-eighth: That afterwards, to-wit: on the 19th day of February, A.D. 1887, in said Circuit Court of the United States for the Southern District of Ohio, Western Division, this case and said other cases pending in said court, as aforesaid, came on to be heard, and thereupon the following entry was made therein by said court:

"This cause coming on to be heard upon the final report of Jacob D. Cox, Special Master herein, and the exceptions thereto and the arguments of counsel, and the court being fully advised, it is considered by the court that the exceptions to so much of the master's report as finds the sum of forty-one thousand, seven hundred and forty-eight and 39-100 dollars ($41,748.39-100) due to the Iron Railroad from the other divisions of the Toledo, Cincinnati & St. Louis system, be and the same are hereby overruled, and that the master's findings of said sum due be and it hereby is confirmed.

"And it is further ordered that the Iron Railroad be not required to pay any indebtedness or charge against it in said cause, except out of said funds and upon an accounting with it therefor."

Twenty-ninth: That no exception was taken to said third and final report of said Jacob D. Cox, as aforesaid, by or in behalf of any party in interest in any court in which the same was filed, except that certain exceptions were taken thereto by your petitioners herein and certain other exceptions by said Central Trust Company or the purchasers of said Cincinnati Division, and said Dayton Division,
and said Dayton and Southeastern Division, or by all or some
201 of them, all of said excepting parties, however, except your petitioners herein, being represented by C. W. Fairbanks, attorney:

and that no other person or parties and no other mortgage division of said Toledo, Cincinnati & St. Louis Railroad, or person or party interested therein, filed any exception in any court to said report, and that said entry was made in said Circuit Court of the United States for the Southern District of Ohio, Western Division, after hearing argument upon said exceptions and that no appeal was claimed or allowed from the overruling of said exceptions by said court as aforesaid.

Thirtieth: That after the sale of said Iron Railroad, in pursuance of said foreclosure proceedings in said Circuit Court of the United States for the Southern District of Ohio, Western Division, in this case as hereinbefore set forth, one William Robinson and others brought an intervening petition in said court and case as income or second mortgage bondholders of said Iron Railroad, setting up among other things the large earnings of said Iron Railroad while in the hands of the receiver and the relief and benefit which ought thereby to accrue to the second or income bondholders in proceedings to set aside or redeem from said foreclosure sale; which said intervening petition was, on exceptions filed thereto by your petitioners, dismissed, but without express prejudice to the right of the petitioners to proceed by an original bill; and said petitioners, to-wit: said Robinson and others, did thereupon file a bill in said court to set aside said sale, the same being numbered 3,739 on the equity docket in said court; which matter, on an appeal to a decree of said court sustaining a demurrer to said bill, is now pending in the Supreme Court of the United States, and if said appeal should be maintained, or any relief by which the complainants would be entitled to redeem should be granted therein, an account would become necessary to and with said complainants, for and on account of all the net earnings of said Iron Railroad during the time the same was in the hands of a receiver, as hereinbefore set forth, as your petitioners are advised.

Thirty-first: That in said bill of said Robinson and others, the legality of the consolidation of said Iron Railroad Company with said Toledo, Delphos and Burlington Railroad Company is denied: and if your petitioners were not justified in relying upon the validity of their claim, as established by the proceedings hereinbefore set forth, it would have been competent and necessary for them also in the protection of their separate rights and interests to have denied the legality of said consolidation, and your petitioners are advised
202 that because of the location and relative situation and difference in the gauge between the roads of said two companies there is great doubt of their authority to consolidate under the laws of the State of Ohio in that behalf.

Thirty-second: That there are other facts and records in addition to those hereinbefore set forth which in the courts and as between the parties tend to establish and maintain the several and separate

interests of said mortgage divisions of said Toledo, Cincinnati and St. Louis Railroad Company and the claim of your petitioners to be reimbursed on account of said net earnings of said Iron Railroad diverted for the benefit of other mortgage divisions of said Toledo, Cincinnati & St. Louis Railroad, as hereinbefore set forth; to all of which and to the testimony taken by said Master Jacob D. Cox, now on file in the Circuit Court of the United States for the Southern District of Ohio, Western Division, your petitioners crave leave to refer at any hearing that may be had upon this petition.

Wherefore, because of all and singular the premises, your petitioners say that they have been aggrieved by the order, judgment and decrees of said Circuit Court of the United States sitting in said Northern District of Ohio, Eastern Division, disallowing said claim of said Iron Railroad and pray that they may be heard in argument upon the question thereof.

JOHN C. COOMBS, *Trustee, Purchaser pro se,*
CHARLES R. BALL, *et al.,*
First Mortgage Bondholders.
By their Att'ys,
JOHN C. COOMBS and
GUSTAVUS H. WALD.

203 STATE OF OHIO, } ss.
HAMILTON COUNTY. }

Gustavus H. Wald, being first duly sworn, says that he is one of the counsel for the purchasers and first mortgage bondholders of the Iron Railroad, and that the allegations of the foregoing petition are true.

GUSTAVUS H. WALD.

Sworn to before me, and subscribed in my presence this 28th day of April, 1887.

[SEAL]

ROBT. C. GEORGI,
Deputy Clerk,
United States Circuit Court, S. D. O.

THE UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION. }

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the petition for rehearing, as the same appears on file and of record in the above entitled cause, in the clerk's office of said court; and I further certify that no appeal was taken from exceptions to, or motion or petition to vacate, or rehear on bill to review the decree of the said court,

made February 19, 1887, wherein all the exceptions to the report of Gov. J. D. Cox, Master, allowing the Iron Railroal claim, so-called, for $41,748.39-100, were overruled.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, Ohio, this 16th day of December, A.D. 1891.

B. R. COWEN, *Clerk.*
By JANIE W. F. COWEN, *Deputy Clerk.*

O. K.
J. W. F. C.

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204 **"B" 3.**

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

The Central Trust Company,
vs.
The Iron Railway Company, *et al.*

Know all men by these presents, That we. the Iron Railway Company and the first mortgage bondholders and purchasers thereof, as principals, and Frederick H. Short and Albert Netter, as sureties, are held and firmly bound unto the United States of America in the sum of one thousand dollars, to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 16th day of May, 1887.

Whereas, the above named The Iron Railroad Company, and the first mortgage bondholders and purchasers thereof, have taken out an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled action by the Circuit Court of the United States for the Southern District of Ohio:

Now, therefore, the condition of this obligation is such, that if the above named The Iron Railroad Company, &c., as aforesaid shall prosecute their said appeal to effect and answer all dam-
205 ages, costs, if they shall fail to make good their plea, then this

obligation to be void, otherwise to remain in full force and virtue.

FREDERICK H. SHORT, [SEAL]
ALBERT NETTER. [SEAL]

Sealed and delivered in presence of
BOYD E. DILLEY,
GEO. C. WRIGHT.

The above security is approved.
GEORGE R. SAGE,
District Judge of the United States, S. D. O.

SOUTHERN DISTRICT OF OHIO, ss.

I, Frederick H. Short, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth two thousand dollars in real estate in my own name, situate in the County of Hamilton, in said district.

F. H. SHORT.

Sworn to before me the 16th day of May, 1887.
[SEAL] ROBT. C. GEORGI,
Deputy Clerk,
U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, ss.

I, Albert Netter, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am
206 worth two thousand dollars in personal property in my own name, situate in the County of Hamilton, in said district.

ALBERT NETTER.

Sworn to before me the 16th day of May, 1887.
[SEAL] ROBT. C. GEORGI,
Deputy Clerk,
U. S. Circuit Court, S. D. O.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, B. R. Cowen, Clerk of the Circuit Court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the original supersedeas bond filed in the clerk's office on May 16, 1887, in the above-entitled causes: The Central Trust Company, *vs.* The Iron Railroad Co. *et al*, which causes are numbered 3,554, 76, 77, 78 and 79 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, O., this 8th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By JANIE W. F. COWEN, *Deputy Clerk.*

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207 **"C" 3.**

May 4th, 1887.

HON. HOWELL E. JACKSON,
Judge Circuit Court, &c.

Dear Sir:—*In re* Toledo, Cincinnati & St. Louis Railroad.

When at the hearing in Cleveland in the above cases I suggested that I was at great disadvantage from the absence of the records of the Circuit Court for the Southern District of Ohio, Western Division, and would like a re-argument where that record would be available, before the decree against the claim I presented should be regarded as final, I construed the silence of the court as an indication that the suggestion might not be regarded as unreasonable.

I have examined that record and filed a petition for re-argument. Should the petition be granted I am especially desirous that both Mr. Justice Matthews and Judge Gresham should be present at the re-argument, if it can possibly be so arranged, or at least one of them, because, apart from the merits of my case, I recognize the force of the comity or implied reciprocity between the courts of the Circuits which such action as was taken at Cleveland must rest upon, and that the practical administration of justice requires its cordial maintenance. That consideration is, I think, sufficient to deter me from asking to be heard by your Honor or Judge Sage only; but if, after examination and mature reflection, I am convinced that there ought to be a rehearing, it is my duty to take the responsibility of asking for it, if I can bring together the court as it was constituted before, or with a representative of the court to which I must appeal.

I understand that Mr. Justice Matthews will be in Cincinnati about May 20th, at which time also you are expected to be there; and what I wish to bring about is a decision on the preliminary motion, so that, if favorable, a hearing may be had on the re-argument while Mr. Justice Matthews is in the circuit, or at some time convenient to Judge Gresham, or both, if possible.

A copy of the petition, which is of some length, will be sent to you at any time on notice to my associate, Gustavus H. Wald, Esq., of Cincinnati, or if you would notify him of any time at your

convenience when the preliminary motion could be brought up, he would give notice.

Very respectfully,
(Signed) JOHN C. COOMBS.

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208 **"D" 3.**

HON. WALTER Q. GRESHAM,
Judge, &c., Chicago, Ill.

Dear Sir:—

Enclosed please find copy of a letter which I forwarded at its date to my associate in Cincinnati, Mr. Wald, to be delivered to Judge Jackson when his address should be known, and which Mr. Wald handed to Judge Jackson after his return to Cincinnati.

The letter explains itself. I am advised by Mr. Wald that Judge Jackson has fixed the 6th of June next as a time for hearing the petition, and I understand that Mr. Justice Matthews will probably be present. My own experience has been that a hearing on a petition for a rehearing is very likely to be in itself more or less of a rehearing, and that is more probable, from the grounds alleged, in this case than ordinarily.

I know that the interests involved are small in comparison with others pressing upon your attention, and I was reluctant to ask for a rehearing, after so much time was given to these matters at Cleveland, but my conviction that I ought to do so leaves me no choice. I do, however, very much wish that I may have the benefit of your own review of whatever I may be permitted to present, and I write to ask you to be present. The fact that I cannot make this request as of right seems to me to be sufficient for its propriety, and I trust is enough to induce your kindness to take up the extra burden if you can. Of course I ask subject to your other engagements, but as earnestly as I may in my ignorance of them.

Very respectfully,
(Signed) JOHN C. COOMBS.

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209 **"E" 3.**

CHICAGO, June 2nd, 1887.

JOHN C. COOMBS, Esq.,
Cincinnati, Ohio.

Dear Sir: Your letter of etc., 30th ult. with inclosure, came during my absence on the circuit, hence this delay in replying. It

will be impossible for me to be in Cincinnati on the 6th inst., as I am now sitting with Judge Harlan in hearing equity cases.

If Justice Matthews and Judge Jackson grant a rehearing on your application and enter such a decree as you desire, I presume I will conform to their action in the circuit.

You are at liberty to show them this letter if you like, that they may understand why I do not appear as requested.

W. Q. Gresham.

Copy.

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210 **"J" 3.**

The United States of America,
Southern District of Ohio,
Western Division. } ss.

At a stated term of the Circuit Court of the United States within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of April, being also the 5th day of that month, in the year of our Lord one thousand eight hundred and eighty-seven and of the Independence of the United States of America the one hundred and eleventh.

Present, the Honorable George R. Sage, District Judge.

On August 1st, 1887, among the proceedings had were the following, to-wit:

The Central Trust Co., of New York,
vs.
The Toledo, Cincinnati & St. Louis Railroad. } *No. 3,554.*

The Central Trust Co., of New York,
vs.
The Toledo, Delphos & Burlington Railroad Co. *et al.* } *No. 3,576-77-78.*

The Central Trust Co., of New York,
vs.
The Iron Railroad Co., *et al.* } *No. 3,579.*

These causes coming on to be heard before his Honor Mr. Justice Matthews and his Honor Judge Jackson, upon the petition filed April 23, 1887, of the first mortgage bondholders and purchaser of the Iron Railroad, praying that the decree entered in said
211 causes pursuant to a hearing had at Cleveland at a term of the Circuit Court, beginning April 6th, 1887, before Judge Gresham,

Judge of the 7th Judicial Circuit, and Judge Jackson of the Sixth Judicial Circuit, and Judge Welker, District Judge of the Northern District of Ohio, be in part set aside and for a rehearing as to the claim of the Iron Railroad for net earnings in the sum of forty-one thousand, seven hundred and forty-eight and 39-100 dollars earned while in the hands of the receivers, and the court being fully advised it is considered by the court that said decree be, and it hereby is, set aside, vacated and annulled in so far as the same disallows said claim for rehearing and such further order and decree as may hereafter be made in respect to the same, and that this decree be entered in all said causes pending in the Sixth Circuit.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO. } ss.
WESTERN DIVISION.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, O., this 19th day of December, A.D. 1891.

B. R. COWEN, *Clerk.*
By JANIE W. F. COWEN, *Deputy Clerk.*

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212 **"K" 3.**

UNITED STATES COURTS, JUDGES' ROOM,
NASHVILLE, TENN., July 29th, 1887.

BENJ. R. COWEN,
Clerk U.S. Circuit Court, Cincinnati, Ohio.

Sir: The application of the first mortgage bondholders and the purchasers of the Iron Railroad Company for a rehearing of the decree made at Cleveland in April, 1887, in the causes of "The Central Trust Co., of New York *vs.* The Iron Railroad Co., *et al.*," and "The Central Trust Company *vs.* The T., C. & St. L. R. R. Co., and its constituents, in Ohio, Indiana and Illinois," disallowing the claims of said Iron Railroad Company for the sum of $41,748.39, as its net earnings while in the hands of the receiver in said causes, was heard before Mr. Justice Matthews and myself in June last, and after full consideration of the same, we are of the opinion that said application should be granted and that there should be a rehearing as to said claim. An order may accordingly be entered setting aside,

vacating and annulling the decree made at Cleveland in the above cases so far as the same disallows said claim for $41,748.39, which will stand for rehearing and such further order and decree as may hereafter be made in respect to the same.

You will please notify counsel for the application, John C. Coombs, of Boston, Mass., and Gustavus H. Wald, of Cincinnati, of the conclusion of the court so that they may prepare the necessary entry in the premises. Yours truly,

HOWELL E. JACKSON.

P.S.—I will return, by same mail that carries this—the papers in the causes, so far as sent me.

213 THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and correct copy of the original opinion of Howell E. Jackson, filed in the clerk's office of said court on the 1st day of August, A.D. 1887, in the causes entitled the Central Trust Co., of New York *vs.* The T., C. & St. L. R. R. Co. *et al.*, which causes are numbered 3,554-76-77-78 and 79 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the City of Cincinnati, Ohio, this 6th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By JANIE W. F. COWEN, *Deputy Clerk.*

214 **"L" 3.**

UNITED STATES COURTS, JUDGES' ROOMS,
GLENDALE, O., June 13, 1887.

My Dear Judge: —

On consideration I submit to you the following suggestions upon the question as to the allowance to be made to the Iron R. R. Co. on account of the net earnings arising from the operation of its road having been applied by the receiver under the orders of the court to the expense of operating other parts of the consolidated line.

I assume that the theory upon which the administration was had in the circuit, was that of separate receiverships for each division and that it is too late now to question its correctness in point of law.

The receiver of the Iron Railroad is bound to account in that case

for all its earnings, including the amount in question. He shows that under the order of the court he permitted it to be used by the receivers of the other divisions of the road; the court is therefore bound to see that these receivers in proper proportions refund it. It would seem therefore that such decrees should be entered in all the cases in this circuit and that the Cleveland decree therefore, so far as it conflicted with this result, should be set aside either on the ground that the matter had been previously adjudged or that it was erroneous in those cases in which Judge Sage's decree was not conclusive.

As to the cases in Indiana and Illinois, it must be left to Judge Gresham to decide upon what rule he will act.

If he declines to make the allowance against the divisions within those States the divisions in this circuit should only be charged with their proportions of the whole. Yours truly,

(Signed) STANLEY MATTHEWS.

215 HON. HOWELL E. JACKSON,
U. S. Circuit Judge.

The above is a true and correct copy of the original letter in my possession.

HOWELL E. JACKSON, *Circuit Judge.*

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and correct copy of the original abstract of a letter filed in the clerk's office of said court on the 14th day of November, A.D. 1888, in the cause entitled The Central Trust Company, of New York, *vs.* The Toledo, Cincinnati & St. Louis R. R. *et al.*, which causes are numbered 3,554-76-77-78 and 79, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, O., this 16th day of December, A.D. 1891. B. R. COWEN, *Clerk.*

By JANIE W. F. COWEN, *Deputy Clerk.*

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216 **"V" 3.**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern Dis-

trict of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of October, being also the 2nd day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth.

Present, the Honorable George R. Sage, District Judge.

On Monday, the 12th day of November, A.D. 1888, among the proceedings had were the following, to-wit:

The Central Trust Co., of New York,
vs.
The Toledo, Cincinnati & St. Louis R. R. Co. } *No. 3,554.*

The Central Trust Co,, of New York,
vs.
The Toledo, Delphos & Burlington R. R. Co. *et al.* } *No. 3,576-77-78.*

The Central Trust Co., of New York,
vs.
The Iron Railroad Company, *et al.* } *No. 3,579.*

These cases coming on to be further heard before the Hon. Howell E. Jackson, Judge of the Sixth Judicial Circuit, on the question
217 of the allowance of the claim of the Iron Railroad for net earnings while in the hands of Receivers Dwight and Craig, against the receivers and the narrow-gauge divisions of the Toledo, Cincinnati & St. Louis Railroad and upon the various master's reports and evidence and exhibits filed therewith, and the several exceptions thereto, and upon questions reserved by the joint decree rendered October 1st, 1886, a petition for a rehearing of the question of the allowance of said claim of the Iron Railroad having been heretofore allowed, at the hearing of which petition all the divisions of the T., C. & St. L. R. R. were present, being represented by counsels who were heard in argument.

The court, being fully advised, does find that so much of the joint decree made on April, 1887, pursuant to a hearing had at Cleveland before the Hon. Walter Q. Gresham, Judge of the Seventh Judicial Circuit, the Hon. Howell E. Jackson, Judge of the Sixth Judicial Circuit, and the Hon. Martin Welker, Judge of the Northern District of Ohio. sitting together as relates to said claim for the net earnings, being for $41,748.39, of the Iron Railroad, to-wit, the eighth paragraph of said decree, was inadvertently made. Wherefore it is considered by the court that so much of said decree as relates to said claim, and particularly the eighth paragraph of said decree, be annulled, set aside, and held for naught, which is accordingly done;

and said claim of said Iron Railroad for net earnings is hereby re-established in all respects as fully as if said decree of April, 1887, had never been made. Provided, however, that this decree does not warrant any enforcement or collection of said claim save in said cases Nos. 3,554, 3,576, 3,577, 3,578, and 3,579 without the concurrence herein of the Circuit Courts of the United States for the District of Indiana and the District of Illinois.

And the court reserves the power to require the Iron Railroad to pay out of the sums it may receive in payment of its said claim into the registry of the court, its proportionate percentage of any claims, costs and expenses distributable to the mortgage division of the T., C. & St. L. Railroad according to the tables of distribution applicable thereto in the reports of Master J. D. Cox, heretofore made in said cases, but only out of and in proportion to the payment of said Iron Railroad claim by said other divisions. It is further ordered by the court that out of the funds which may hereafter be collected by the Iron Railroad Company under this decree there shall be first paid to

William J. Craig, late receiver herein, or to Black & Rockhold,
218 of Cincinnati, his attorneys, the sum of fifteen hundred dollars ($1,500.00), said sum being the compensation allowed him by former order of court payable out of said funds.

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, O., this 18th day of December, A.D. 1891.

B. R. COWEN, *Clerk.*
By JANIE W. F. COWEN, *Deputy.*

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219 **"W" 3.**

Dated New York 10. Telegram.

HON. HOWELL E. JACKSON,
U. S. Circuit Court,
Cincinnati, Ohio.

I have received notice that the attorney of the Grant Locomotive Works will apply to you on Monday for an order relating to the payment for certain locomotives and also that an application will be

made by the attorney of the Iron Railroad Co. for some order that will affect the companies I represent. The locomotives were purchased for the Southern Division, with which the interests I represent had nothing whatever to do as to the claim of the Iron Railroad that was passed upon by yourself and Judge Gresham. All I want is that any question affecting the line of road from Toledo to St. Louis shall be passed upon by you and Judge Gresham as originally agreed. If the questions presented do not affect the parties I represent I have nothing to say, but if any order is to be made affecting in any way the property or liability of my clients then I not only wish to be heard, but I wish to be heard before yourself and Judge Gresham. My clients have complied with all the orders made by you and Judge Gresham at Cleveland in every particular.

R. G. INGERSOLL.

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220 **"X" 3.**

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

At a stated term of the Circuit Court of the United States within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said District, on the first Tuesday in December, being the fourth day of said month, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth.

Present, the Honorable John Baxter, Circuit Judge, and Martin Welker, District Judge.

Among the proceedings then and there had were the following, to-wit: Thursday, Dec. 20th.

THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Central Trust Company of New York, as Trustee, etc., *Complainants*,
vs.
The Toledo, Delphos & Burlington Railroad Company, The Toledo, Cincinnati & St. Louis Railroad Company, and Grenville D. Braman, *Defendants*. } *382.* *In Equity.*

Whereas, a bill has been filed by the above-named complainants against the above-named defendants in the United States Circuit

Court for the District of Indiana, asking for the foreclosure of the mortgage set forth in the bill of complaint herein, covering property in Indiana and Ohio, and asking for a decree of sale of such property, under the terms of said mortgage;

221 And whereas, it is deemed by this court so be most conducive to the interest of all parties herein that all the orders made in relation to said foreclosure in one court should be acquiesced in by the other court, and that the primary jurisdiction should be vested in one court, which shall in the first instance make all orders in relation to said foreclosure:

Now, therefore, it is ordered and decreed, the said complainants assenting thereto, that this action shall be and is, and the jurisdiction of this court shall be and is, ancillary to the action so commenced and now pending in said United States Circuit Court for the Seventh Circuit, and to the jurisdiction of the said Circuit Court for the Seventh Circuit, to the end that neither this court nor any judge thereof shall at any time make any orders herein, except such as may be necessary to carry into effect the orders made in relation to said foreclosure and all proceedings thereunder by the Circuit Court of the Seventh Circuit.

JNO. BAXTER, *Judge*, &c.

Dated Toledo, Dec. 19, 1883.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, } ss.
WESTERN DIVISION.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of an order entered upon the journal of the proceedings of said court in the therein entitled cause; that I have compared the same with the original entry of said order, and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court at Toledo, in said district, this 29th day of January, A.D. 1892, and in the year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk*.
By MOLLE W. BROWN, *Deputy Clerk*.

222 **"Y" 3.**

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

November Term, 1889. November 8th, A.D. 1889.

Before Honorable Walter Q. Gresham, and Honorable William A. Woods, Judges.

The Central Trust Company of New York, *vs.* The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706. Chancery.*

Edward F. Leonard, *et al.*, *vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814. Chancery. Consolidated Causes.*

Come now the purchasers and first mortgage bondholders of the Iron Railroad Company, by John C. Coombs and Gustavus H. Wald, their solicitors, and file their petition for a rehearing, and come also the purchasers of the Main Line and Western Divisions of the defendant corporation, the T., C. & St. L. R. R. Co., being the line from Toledo to St. Louis, by Robt. G. Ingersoll and Clarence Brown, their solicitors, and enter their appearances to said petition, and the same is now argued by counsel and submitted to the court, and upon consideration thereof it is ordered by the court that said petition be and the same is hereby allowed, and by agreement of counsel in open court, it is further ordered that said petition
223 be and the same is hereby set down for further hearing before this court on the 13th day of January, A.D. 1890, at 10 o'clock, A.M.

UNITED STATES OF AMERICA, DISTRICT OF INDIANA. } ss.

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order made and entered in said court on the 8th day of November, 1889, in the above entitled causes as fully as the same appears of record in my office.

Witness my hand and the seal of said court at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

224 **"A" 4.**

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

November Term, 1889. February 27th, A.D. 1890.

Before Honorable Walter Q. Gresham and Honorable William A. Woods, Judges.

The Central Trust Company of New York,
vs.
The Toledo, Delphos and Burlington Railroad Company, *et al.*
No. 7,706. Chancery.

Edward F. Leonard, *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*
No. 7,814, Chancery. Consolidated Causes.

Now, on this day, argument having been heard by Messrs. Coombs and Wald, Solicitors for the Iron Railroad Company, first mortgagees and purchasers, and on the part of the bondholders and purchasers of the Toledo Division, by Clarence Brown and R. G. Ingersoll, and the court being fully advised, does hereby order that Honorable William P. Fishback be appointed master, to take evidence and report as to the earnings and expenses of operation of the said Toledo Division of the Toledo, Cincinnati & St. Louis Railroad, from the 1st day of August, 1883, to the 1st day of August, 1884, and to report the basis on which the apportionment of earnings and expenses was made, as well as the character, origin and destination of the traffic over said division.

225 And that the purchasers and bondholders of said Toledo Division have until the first day of April next to take such testimony, and that the other party have twenty-five days thereafter to take testimony on behalf of purchasers and bondholders of said Iron Railroad, and then that bondholders and purchasers of said Toledo Division have until May 1st, 1890, to rebut such further testimony in rebuttal as they may see proper.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of an order made and entered in said court on the 27th day of February, 1890, in the

above entitled cases as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

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226 **"B" 4.**

UNITED STATES CIRCUIT COURT, DISTRICT OF INDIANA.

The Central Trust Company of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706.*

and

Edward F. Leonard,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814.*

In the matter of the claim of the Iron Railroad Company.

For the Iron Railroad Company, Messrs. Coombs & Wald.

For the Bondholders and Purchasers, R. G. Ingersoll and Clarence Brown.

To the Honorable Court:

The undersigned, the master in chancery to whom the matter was referred "to take evidence and report as to the earnings and expenses of operation of the said Toledo Division of the Toledo, Cincinnati & St. Louis Railroad from the first day of August, 1883, to the first day of August, 1884, and to report the basis upon which the apportionment of earnings and expenses was made, as well as the character, origin and distribution of the traffic over said division," now respectfully reports to the court as follows:

The evidence produced before the master consists of the following
227 items, viz.: The depositions of Allen Brown, Neil McKinnon and E. B. Reed, taken by the master at Toledo, Ohio, on the 30th day of April, 1890. Also the deposition and supplemental deposition of C. S. Anthony, taken in New York City, May 15th, 1890, and in the City of Boston on June 11, 1890.

Also the deposition of C. C. Clarke, taken at Cincinnati, Ohio, June 1st, 1890.

Also all documents, agreements, stipulations and exhibits introduced in connection with the taking of said several depositions;

all of which, with said depositions, are filed herewith as a part of this report.

The three principal witnesses who were examined before the master: Mr. C. S. Anthony, Mr. Allen Brown and Mr. Neil McKinnon, unite in saying that many of the books, papers and accounts of the receivership covering the period designated by the order of reference August 1st, 1883, to August 1st, 1884, have been lost or destroyed; Mr. Brown says: "We were not able to find but three or four months business for the year August, 1883, to August, 1884; the books seem to have been lost or destroyed. I dug part of them out in the garret among waste papers." He found records of the Toledo Division for the months of September, October and November, 1883, and April, 1884. He also found papers from which he computed the car mileage from December 1st, 1883, to August 1st, 1884, a period of eight months. He says he took a month and took the mileage for each division and prepared a statement which shows the earnings of each division operated under the system for the month, and it shows the earnings per car per mile and the average earnings per car per mile. The result appears in a tabulated statement appended to his deposition.

Mr. Brown's evidence is that of an expert who was called upon to collect data and prepare tabulated statements showing the result of the traffic on the Toledo Division. So large a portion of the books and papers having been destroyed, it was impossible for him to make any satisfactory statement.

Mr. McKinnon, also an expert, but who had, by reason of his being employed in the receiver's office, better facilities for observation than Mr. Brown, cannot and does not attempt to give a statement of earnings and expenses based upon the actual business of the Toledo Division. He sharply criticises the report of Gov. Cox, which shows, upon the basis adopted by him, that the Toledo Division, during the period covered by the reference, was operated at a loss. On page 10 of that report it is shown that from No-
228 vember 1st, 1883, to April, 1884, the excess of expenditures over income on the Toledo Division was $104,585.04. On the same page of his report Gov. Cox says: "The receiver having, under orders of the court, kept his accounts in such a manner as to show the earnings and expenses of the several divisions of the road separately, since November 1, 1883, an analysis of such accounts show an excess of expenses over income on all the divisions of the road except the Iron Road. The account of the Iron Road shows a balance of income over expenses amounting at April 1st to the sum of $36,716.37."

Gov. Cox examined a number of witnesses, and had the assistance of Mr. Anthony, who was at that time the auditor for the receiver, and was familiar with the books, papers, and accounts, most of which have been since destroyed.

The results arrived at by Gov. Cox are now confirmed by Mr. Anthony in his testimony in this proceeding. He says he is not prepared to say anything as to the earnings and expenses of the Toledo Division from August 1, 1883, to August 1, 1884, in contradiction of the report of Gov. Cox, and further that the basis of apportionment of the earnings and expenses of the divisions of the system during that period was fair and proper.

The testimony of the witnesses Brown, McKinnon, and Reed is to the effect that the Toledo Division, if it had been a separate road, and had been operated exclusively in its own interest, and had carried its freight at remunerative rates, it would in their opinion have made money. This is largely a matter or surmise and speculation, and does not, in the master's opinion, outweigh the judgment of Gov. Cox and the testimony of Mr. Anthony, who spoke from a fuller knowledge of all facts than it is possible to obtain at this late day, when so much of the important evidence which was then accessible has since been lost and destroyed. The tabulated statements furnished from the actual operation of the Toledo Division, after it was severed from the Ohio part of the narrow-gauge system, do show that at that time the division did and could make net earnings.

Upon the evidence before me herein, I report that said division did not during the period from August 1, 1883, to August 1, 1884, make any earnings in excess of expenditures, and I further report that it is impracticable from any evidence produced before me, or from any evidence that can now be obtained, to make a statement showing the actual earnings and expenses of operating of said Toledo Division for the period covered by the reference.

229 The witnesses Brown and McKinnon both agree in the statement that owing to the loss and destruction of the books, accounts, and papers, it is impossible to state the character; origin, and distribution of the traffic over said division, and I report that to be the fact.

The evidence does not show that the apportionment of earnings and expenses, as made by Gov. Cox in his report, was too favorable to the Iron Railroad Company; the uncontradicted evidence of Mr. Clark is that ninety per cent. of the traffic of that division was local and profitable, while most of the general traffic of the system, including the Toledo Division, was unprofitable.

Respectfully submitted,

WILLIAM P. FISHBACK,
Master.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and fore-

going is a full, true and complete copy of the report of the master in chancery filed in said court on the 13th day of February, 1891, in the causes of the Central Trust Company of New York *vs.* The Toledo, Delphos & Burlington Railroad Company, *et al.*, No. 7,706; and Edward F. Leonard *vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*, No. 7,814, as fully as the same remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

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230 **"C" 4.**

1. The underlying mortgage is a first lien on the property and on surplus earnings.

2. If no surplus earnings exist, then the entire system bears the loss.

3. The Iron Co. was a part of the system, and under Dwight was operated in behalf of judgment creditors, and the claim is now that there were net earnings of $17,000 on Iron Co., but it is admitted that all the earnings of the entire system were not sufficient to pay expenses, without counting car rentals, etc.

4. In this case we claim that if the receiver took the earnings of the Iron Co., he also took earnings of Toledo Division. Now, should this court compel Toledo Division to pay what was taken by receiver back to the Iron Co.? Can one victim be compelled to repay the other victim?

5. The court in Southern Ohio has lost jurisdiction of the five divisions, and unless such jurisdiction can be regained so that they can be compelled to refund the money taken from the Toledo Division, that division should not be compelled to pay anything to the Iron Co.

6. Toledo Division did not apply for the money taken, because in the 7th Circuit the property was operated as one system, and all claims have been decided on that theory.

231 **"D" 4.**

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

The Central Trust Company of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.*
No. 7,706. Chancery.

Edward F. Leonard,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*
No. 7,814. Chancery.

Hearing at Toledo, Ohio, April 30th, 1890, before Hon. W. P. Fishback, Special Master.

Appearances: For the Iron Railroad, G. H. Wald, Esq.

For the first Mortgage Bondholders and Purchasers, and for Toledo Division, Clarence Brown, Esq.

Mr. Wald requested the production before the master of the affidavit of Neil McKinnon, on the strength of which this order for hearing was made by Judge Gresham, together with the answer to the petition in this matter, and objected to the introduction of any evidence until said two papers were filed and produced to the master, notice having been twice given to Mr. Brown to produce said papers, and notice having been given to the master that their production would be insisted upon.

232 MR. BROWN: I do not understand that the purchasing bondholders of the Toledo Division, as such, were permitted to file either an answer or affidavit at that hearing — Judge Gresham announcing that, if it became necessary hereafter to file an answer, and the purchasers and bondholders made application therefor, that the question would be passed upon at that time. If the answer or affidavit is required for the purpose of evidence it will be produced, but neither paper is understood to form any material part in the issue to be passed upon by the master.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a true copy of a portion of the evidence filed in said court on the 21st day of February, 1891, by W. P. Fishback, Esq., Special Master in Chancery, with his report on the claim of the Iron

Railroad Company filed in said court on the same date, in the above entitled causes.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 19th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

233 **"E" 4.**

Feb. 27, 1890.

NOBLE BUTLER, Esq.,
Clerk U. S. C. C., Indianapolis, Ind.

Friend Butler:—

In Central Trust Co. *v.* The T., C. & St. L. R. R. hearing at Chicago, on Monday and Tuesday, Judge Gresham entered an order, entitled Central Trust Co. *v.* The Iron Railroad Co., for the appointment of William P. Fishback as master to take testimony concerning the operations of the Toledo Div. of the T., C. & St. L. I would like a certified copy of the order as soon as you can send it to me. Col. Ingersoll also at the same time filed an answer to the petition of the first mortgage bondholders and purchasers of the Iron Railroad; and also a certain affidavit of one Neal McKinney, both of which I suppose have been sent to you. If so, I would like certified copies of that answer and affidavit. Of course, if Col. Ingersoll did not file it, you cannot send me copies, but I would like to be informed in the matter.

Respectfully, J. C. COOMBS.

Dictated.

INDIANAPOLIS, Mch. 3rd, 1890.

J. C. COOMBS, Esq.,
Boston, Mass.

Dear Sir: Enclosed find copy as requested, for which my fees are 75c.

234 The answer to petition of 1st mort. bondholdlers & affidavit of Neal McKinney have not been filed. Respectfully,

NOBLE C. BUTLER, *Clerk,*
(N.)

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of a letter dated Feb. 27th, 1890, and received by me, signed J. C. Coombs, and also a full, true and complete copy of my answer to said letter.

Witness my hand and the seal of said court at Indianapolis, in said district, this 22nd day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

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235 **"F" 4.**

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

Central Trust Company, of New York, *et al.*,
vs.
Toledo, Delphos and Burlington Railroad Company, *et al.*
} *No. 7,706.*

and

Edward F. Leonard, *et al.*,
vs.
Toledo, St. Louis and Kansas City Railroad Co., *et al.*
} *Nos. 7,814, 7,815.*

In the matter of the claim of the Iron Railroad Company.

Exceptions of Sylvester H. Kneeland on behalf of himself and of other first mortgage bondholders to the report of William P. Fishback, Special Master, filed herein February 13th, 1891.

Now comes Sylvester H. Kneeland, purchaser of the railroad property, rights and franchises sold at foreclosure sale under the decrees ordered in the above-entitled causes, and owner and trustee for a large majority of the bonds secured by the mortgages foreclosed in the above causes, files his exceptions to said reports, excepts to each and every of the master's findings and reports, and for exception assigns the following causes:

First: Because the said master finds and reports that the Toledo Division did not, during the period from August 1st, 1883, to August 1st, 1884, make any earnings in excess of expenditures; whereas, in fact, the evidence shows that, if operated independently of the other divisions of said Consolidated Toledo and Cincin-
236 nati and St. Louis Railroad, the said division would have made, and as so operated did in fact make earnings in excess of expenditures.

Second: Because the said master finds and reports that it is impracticable from the evidence produced before him, or from any evidence that can be obtained, to make a statement showing the actual earnings and expenses of said division for the period named; whereas in fact the evidence is sufficient to show whether said division made earnings in excess of expenses, and said master from said evidence does in fact make such finding and report.

Third: Because the said master finds and reports that said division did not, during the period named, make any earnings in excess of expenditures, upon reports of the master and statements of the receiver heretofore made in reference to the earnings and expenses of the entire railroad as one consolidated system, said earnings and expenses being apportioned among the various divisions; whereas said master should have found and reported as to the earnings and expenses of said Toledo Division on its own account, and not on account of the earnings and expenses of the other divisions of said system.

Fourth: Because said master finds and reports that it is impossible to state the character, origin and destination of the traffic over said division, whereas the evidence shows the character, origin and destination of such traffic, and the master should have found and reported in accordance therewith.

Fifth: Because said master fails to report that a large amount of free traffic was done on said Toledo Division for the benefit of other divisions of said system, for which said Toledo Division never received any credit; and further, that said Toledo Division was compelled to do a large amount of unprofitable business originating upon other divisions of said system, which was taken for the benefit of the divisions upon which it originated, and was done by said Toledo Division without receiving any proper credit therefor.

Sixth: Because said master finds and reports that "the evidence does not show that the apportionment of earnings and expenses as made by Gov. Cox in his report was too favorable to the Iron Railroad Company. The uncontradicted evidence of Mr. Clark is that 90 per cent. of the traffic of that division is local and profitable, 237 while most of the general traffic of the system including the Toledo Division was unprofitable"; whereas in fact the evidence does not show that most of the general traffic of the system including the Toledo Division was unprofitable, or that any of the traffic originating upon the Toledo Division was unprofitable.

Said master was not directed or required by the order of reference to take any evidence or make any report as to the apportionment of earnings and expenses to the Iron Railroad Company, or as to whether the traffic of the Iron Division was local and profitable, and no evidence was offered or proper to be admitted upon that question, except as presented incidentally in connection with the question referred to said master for determination.

Respectfully submitted,

SYLVESTER H. KNEELAND,
for himself and other Mortgage Bondholders,
By R. G. INGERSOLL and
CLARENCE BROWN,
his Solicitors.

Toledo, March 11, 1891.

238 UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the exceptions of Sylvester H. Kneeland *et al.* filed in said court on the 12th day of March, 1891, in the causes of The Central Trust Company, of New York, *vs.* The Toledo, Delphos & Burlington Railroad Company *et al.*, No. 7,706; and Edward F. Leonard *et al.*, *vs.* The Toledo, Cincinnati & St. Louis Railroad Company *et al.*, No. 7,814, as fully as the same remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 18th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

239 **"G" 4.**

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that on the 28th day of June, 1887, Sylvester H. Kneeland *et al.* filed in said court their exceptions to the third and final report of J. D. Cox, Special Master, which exceptions were filed *nunc pro tunc* April 16th, 1887, and were filed in the causes of The Central Trust Company of New York *et al.*, *vs.* The Toledo, Delphos & Burlington Railroad Company *et al.*, No. 7,706, and Edward F. Leonard *vs.* The Toledo, Cincinnati & St. Louis Railroad Company *et al.*, No. 7,814; and I do hereby further certify that on the 27th day of October, 1887, said exceptions were by me sealed up in an envelope and addressed to W. H. Bradley, Clerk U. S. Courts, Chicago, Ill., and endorsed for Mr. Coombs, and that said W. H. Bradley, clerk as aforesaid, acknowledges receiving said envelope, but is unable now to find the same.

Witness my hand and the seal of said court at Indianapolis, in said district, this 19th day of December, A.D. 1891.

NOBLE C. BUTLER, *Clerk.*

240 **"J" 4.**

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, on the first Tuesday of April, being also the 5th day of that month in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States of America the one hundred and eleventh.

Present, the Honorable George R. Sage, District Judge.

On Tuesday, the 12th ~~day~~ of April, A.D. 1887, among the proceedings had were the following, to-wit:

Grenville D. Braman,
vs. } *366.* Northern District of Ohio, Western Division.
The Toledo, Cincinnati & St. Louis.

Grenville D. Braman,
vs. } Dist. of Indiana.
The Toledo, Cincinnati & St. Louis.

Grenville D. Braman,
vs. } Dist. of Illinois.
The Toledo, Cincinnati & St. Louis Railroad Co. and others.

The Central Trust Company of New York,
vs. } *No. 3,554.*
The Toledo, Cincinnati & St. Louis.

241 The Central Trust Co. of New York
vs. } *Nos. 3,576-77-78.* Southern Dist. of Ohio, W. D.
The Toledo, Delphos & Burlington Railroad Company and others.

The Central Trust Co. of New York,
vs. } *No. 3,579.*
Iron Railroad Co. and others.

The Central Trust Co. of New York and others,
vs. } Consolidated Cause. Dist. of Indiana.
The Toledo, Cincinnati & St. Louis R. R. Co. and others.

The Central Trust Co. of New York,
vs.
The Toledo, Delphos and Burlington Railroad Co. and others.

Northern Dist. of Ohio, Western Division.

These causes coming on to be further heard before the Hon. Walter Q. Gresham, Judge of the Seventh Judicial Circuit, Hon. Howell E. Jackson, Judge of the Sixth Judicial Circuit, and the Hon. Martin Welker, District Judge of the Northern District of Ohio, sitting together upon the various master's reports and evidence and exhibits filed therewith, and the several exceptions thereto, and upon questions reserved by the joint decree rendered October, 1, 1886, and upon the application of the Receiver, William J. Craig, for additional compensation, and evidence heard by the court upon said application.

The several parties in interest having been duly notified of said joint hearing, and being present in person or by counsel. Upon full argument the court, the said judges concurring, doth here now finally order, adjudge and decree as follows, touching the several matters hereinafter in this decree mentioned and sent forth, to-wit:

1.

It is ordered, adjudged and decreed that all claims accrued during the six months prior to the receivership, known as six
242 months claims, of every character and description, however evidenced, be and the same are hereby rejected and disallowed, excepting only pay-rolls for the labor performed in the operation of the railroad during the six months prior to the receivership, to-wit, unpaid pay-rolls for labor performed in the operation of the railroad during the months of February, March, April, May, June, and July, A.D. 1883, which unpaid pay-rolls are to be paid out of the purchase-money funds arising from the sales of the several divisions of said railroad in the proportion and upon the percentages hereinafter in this decree set forth.

2.

Interest on all claims allowed by the court, and ordered to be paid out of the proceeds of sale of the several divisions of said railroad, is disallowed, excepting only interest upon receiver's certificates as provided in the body of said certificates.

3.

All of the claims set forth in Exhibit "A," with report of Fishback and Ricks, Special Masters, filed March 10, 1887, excepting only the following, to-wit: Claim of Curtis and Brainard for one hundred and eighty-four (184) dollars, being Claim No. 29 in said Exhibit A, which is hereby rejected and disallowed, and excepting the claims of the Southeastern Division, the Dayton Divisions, the Cincinnati Division and the Iron Division, which are hereinafter specifically rejected and disallowed—are hereby allowed as to the amounts accrued between August 1, 1883, and Aug. 1, 1884, as in said report and

exhibit set forth; and the purchasers of said several divisions are hereby ordered, directed and decreed, within thirty (30) days from and after the entry of this decree, to pay into the Registry of Indiana a sum of money sufficient to pay and discharge the proportional part of said entire indebtedness as set forth in said Exhibit A and pay-rolls, as provided in clause one of this decree — excepting the claims hereinabove excepted and disallowed — payable by and charged against said several divisions upon the basis of percentages as herein decreed and set forth, subject to credits as provided in the tenth clause of this decree.

The names of the claimants and the amount allowed to each claimant respectively, is set forth in said Exhibit A, and is herein and hereby allowed and decreed to be paid, being the following, namely:

243 List of Claims Accruing Between August 1, 1883, and August 1, '84, Allowed by Masters Fishback and Ricks and Approved by Court.

Arms, Bell & Co.	$141.20
Atlantic & Pacific Railway Co.	126.41
Brown & Knowder Mfg. Company	52.50
Bohanan, Wilson	83.20
Blitz & Son, Israel	334.13
Baugh Steam Forge Company	1,134.66
Blade Printing and Paper Company	2,979.11
Bostwick, Braun & Co.	2,379.76
Barker, Dwight	251.54
Butler & McCracken	368.49
Baltimore Iron and Copper Works	1,014.73
Bass Foundry & Machine Works	8,009.22
Buck, M. M.., & Co.	1,051.51
Bradford, Moses	242.50
Bain & Co., A. N.	310.67
Canniff, J. J.	10.50
Coit & Co.	312.85
Cleveland Rubber Co.	140.00
Cleveland, Brown & Co.	2,910.44
Crern, Adams & Co.	2,024.73
Comly & Co.	93.30
Campbell & Young	97.33
Cashman, William	8.00
Crow, Hagardine & Co.	63.64
Cary, C. C.	37.50
Cincinnati Ice Co.	15.25
Cleveland Co-Operative Stove Co.	43.19
Canada Railway Co.	10.64
Chicago, St. Louis & P. R.R. Co.	148.07

Cammeyer & Sayer	25.00
Clark, S. S.	3.75
Durnell, A. M.	105.30
Diamond State Car Spring Co.	216.04
Delphos Light Bbl. Co.	25.00
Dodd, Jefferson	50.00
Dickson, Benj.	65.00
Dawes, Samuel O.	500.00
Denny Stave Co.	30.40
244 Ellis, Thomas G.	40.00
Eureka Iron & Steel Works	909.32
Emma Coal Co.	798.74
Eaton & Co., Fred	223.97
French & Co., A.	285.84
French, Hugh	2,577.65
Fairbanks, Morse & Co.	36.30
Ford, Johnson & Co.	32.85
French Spiral Spring Co.	1,161.25
F. & P. M. R. R. Co.	24.12
Fisher, George W.	61.00
Gaines, James	344.00
Gunzberg, Rich A.	15.20
Galena Oil Works	4,178.55
Gaskell & Co.	444.47
Hall, John F.	176.22
Hoopes & Townsend	1,159.41
Hart Mfg. Co.	30.00
Haughton & Kneiser	6.40
Hartwell Bros.	17.80
Hassenzahl & Daudt	14.50
Ind'pl. & St. Louis Railway Co.	740.66
John & Later	107.25
Joyce, Gridland & Co.	123.05
Jones, David J.	26.50
Keyser, Chauncey	150.00
Ketcham, D.	15.90
Lye & Zimmerlee	102.50
Liflet, W. R.	89.00
Love & Alden	275.00
Leon, B.	51.63
Landam & Co.	17.00
Lake Erie Iron Works	643.18
McCullough, J. H.	92.00
Matchell & P. E. Co.	8,816.16
McGlore & Co., J. R.	17.35
Same	5.00
245 Murphy & Co.	403.57

Moses Bros., M.	7,223.62
McConway, Torley & Co.	14.88
Morden Frog & Crossing Co.	198.00
Marvin, Ely & Co.	24.00
Merchants & Co.	63.62
March & Co., P. G.	556.59
Murphy, John A.	190.66
Morrow, W. B., Ad'm'r of O. P. Gould	5,000.00
McDermitt, S. T.	16.00
Michigan Central Railway	12.82
Murphey Bros.	63.27
McConnell, C. H.	36.35
Newler, Alfred	25.00
Norton, L. J.	25.00
Nathan & Dryfus	1,993.20
Nathan Mfg. Co.	94.20
Norton, L. J.	12.00
National Railway Publishing Co.	128.58
North, Job	1,327.84
Newton & Luce, *et al.*	8,028.96
Martha & George Stebbins	3,969.87
N. Y., L. E. & W. Ry. Co.	2.57
Otis Iron & Steel Co.	517.54
Outcalt, Miller	80.00
Plunket, Jonathan	167.55
Pettibone & Mulliken	1,963.79
Peckham, E. G.	15.55
Pierson & Co.	8.80
Plumbago Oil Co.	332.33
Polk, E. T. & Co.	25.00
Peter, Williams	617.76
Pool Bros.	753.14
Pierson, S. F.	17.50
Pommer & Lash	24.00
Post & Co.	12,098.28
Ross, William F.	200.00
Royce & Pulling	30.00
Rouse, N. B.	116.00
Roberts Com. Co.	257.32
246 Reynolds Bros.	567.51
Richards, C. M.	52.00
Railway Speed Recorder Co.	653.10
Smith, Oliver	41.00
Scribner, C. H.	345.51
St. Louis & San Francisco Ry. Co.	19.95
St. L. Transfer Co.	310.50
Shaw, Kendall & Co.	1,004.03

Short & Foreman	929.32
Stotlar, John	15.25
St. L. Bolt & Iron Co.	725.00
Springfield I. Co.	618.07
Snyder, C.	447.40
Smith & Co., W. H. H.	2,716.19
Simmons, H. Co.	194.77
Signal Oil Co.	4,745.40
Shelley Bros.	20.00
Scott, Judge A.	500.00
Scott, Robert W.	750.00
Taylor Bros.	80.00
Thresher & Co.	353.74
Tennessee Lum. Co.	306.64
Toledo Bolt & Nut Co.	1,322.15
Toledo Bee Co.	33.70
Union Brass Mfg. Co.	578.83
Walker, J. W.	105.00
Waite, John A.	21.55
Whittaker, Haynes & Co.	248.87
Whitney & Tracy	10.94
West & Traux	115.99
Wade, M. S.	106.50
Williamson, George H.	61.00
Westinghouse Air Brake Co.	813.10
Whites Golden Lubricator Co.	3,653.92
Wood & Acklin, A.	62.40
Walker, J. W.	22.50
Wilcox, M. F.	265.44
Wolfe Coal & Mining Co.	66.66
Ward, J. B.	27.30
York & Hilsabeck	23.95

247 To which order and decree decreeing the payment into court of a sum of money sufficient to pay the portion of said claims distributed to the lines purchased by him, purchaser Kneeland excepts for himself and other first mortgage bondholders, his associates. And said Kneeland and his associates especially and specifically except to the ruling of the court requiring payment of the claims of Luce and Newton and Stebbins, as set forth in said Exhibit A, filed March 10, 1887, with report of Masters Ricks and Fishback.

And said Luce and Newton and said Stebbins except to the disallowance of interest upon their claims.

And Post & Company and W. B. Morrow, Adm'r, also except to the disallowance of interest upon the order in their favor, and pray an appeal, which the court allow and fix the bond at one thousand (1,000) dollars.

4.

The claim presented in behalf of the Southeastern Division, the Cincinnati Division and the Dayton Division for compensation for the transportation of coal over said divisions, and consumed in the ordinary operation of the entire system, upon other divisions of said system, is hereby rejected and disallowed, and the exceptions to the master's reports allowing said claims are hereby sustained.

And said purchasers of said several divisions especially and specifically except to the ruling of the court in rejecting and disallowing said claim.

5.

It is further decreed that in addition to the sum of $3,671.85 heretofore paid to the Brooks Locomotive Works by Receiver Dwight upon the five locomotives delivered to said receiver by said Locomotive Works, there be and is hereby allowed and decreed to be paid to said Brooks Locomotive Works, in full payment of said five locomotives, the further sum of thirty-three thousand, eight hundred and twenty-eight and 15-100 dollars ($33,828.15), said payment to be distributed to the several divisions upon the basis of percentages
248 provided in the 7th clause of this decree, and with this modification of the master's report on said claim the exceptions filed thereto by purchaser Kneeland are hereby overruled, and to this ruling and decree on said claim, report and exceptions thereto, purchaser Kneeland excepts.

And the purchasers of the Southeastern Division, Dayton Division, Cincinnati Division, and the Cincinnati Northern Division also except.

6.

It is further decreed that the claim of the Smith Bridge Co., amounting to the sum of twenty-four hundred and six and 15-100 (2,406.15) dollars, be and the same is hereby allowed. It is ordered and decreed that the said sum of twenty-four hundred and six and 15-100 (2,406.15) dollars, be paid to said Smith Bridge Co., out of the proceeds of sale derived from the sale of the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois, in pursuance of the terms, conditions, and requirements of the decree of foreclosure and sale of said St. Louis Division. This clause of this decree is entered by agreement and consent of the parties in interest, the said Smith Bridge Company consenting and agreeing in open court to accept in full satisfaction of said claim the principal thereof without interest.

7.

It is further ordered, adjudged and decreed that all of the indebtedness of Receivers Dwight and Craig, incurred from August 1, 1883, to August 1, 1884, except car and equipment rental, which has been provided for by former decrees entered in these causes, and excepting such receivers' indebtedness incurred during such period

from August 1, 1883, to August 1, 1884, as may be held and finally decreed to be a specific lien or local charge upon certain specified divisions of said railroad, shall be and the same is apportioned among the several divisions as follows:

	%
Dayton Division	12.98
Dayton & Southeastern Division	30.00
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division and Toledo Division, including Toledo Terminals	51.50

249 The apportionment of the St. Louis Division and Toledo Division, including the Toledo Terminals, is made in a single percentage by agreement of all parties in interest.

8.

It is further ordered, adjudged, and decreed that the claim of the Iron Railroad for forty-one thousand, seven hundred and forty-eight and 39-100 ($41,748.39) dollars, reported and allowed by Gov. Cox, Special Master, be and the same is hereby rejected and disallowed. The exceptions now allowed to be filed to the master's report allowing said claim, are hereby sustained, and it is finally ordered, adjudged, and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale take nothing by said claim and proceedings thereunder. To which ruling, in disallowing and rejecting said claim, the purchasers of the Iron Railroad, and the bondholders holding bonds secured by the first mortgage upon said Iron Railroad, here now except by leave of the court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

9.

It is further ordered, adjudged and decreed that the claim for additional compensation for services as receiver presented by William J. Craig, be and the same is hereby rejected and disallowed. It is further ordered and decreed that the amounts heretofore received by said Craig as receiver shall be and are hereby decreed to be a full payment and compensation for all his services as such receiver, and it is further ordered and decreed that the said Craig be and he is hereby fully and finally discharged of and from all liability of his trust as such receiver. Said receiver's compensation to be distributed to the several divisions upon the basis of percentage set forth in the 7th clause of this decree.

10.

In making payment of their distributive portion of indebtedness

of the receivership incurred from August 1, 1883, to August 1, 1884, as provided in the 77th clause of this decree, the purchaser or purchasers of the several divisions shall be entitled to and
250 shall receive credit as between itself and all other divisions upon his or their distributive portion of said indebtedness for the amount already heretofore paid by him or them upon and in payment of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884.

It is further hereby ordered that any purchaser in paying into the registry of the court his distributive share of said receiver's indebtedness incurred from August 1, 1883, to August 1, 1884, shall have credit upon his said distributive share for all of such indebtedness already paid him, or by the receiver of the division or divisions purchased by him after August 1, 1884, upon producing the vouchers evidencing such payments.

11.

It is further adjudged and decreed that the Iron Railroad pay in accordance with the finding and report of Master J. D. Cox, for car rentals and repair and loss of rolling stock one and 98-100 per cent. of the total amount which may be owing from car rentals and loss and repair of rolling stock by the Toledo, Cincinnati and St. Louis Railroad Co. for the period during which said Iron Railroad was in the hands of the receiver appointed in this cause.

To which judgment and decree the purchasers and first mortgage bondholders of the Iron Railroad except and pray an appeal, which exception and appeal are allowed by this court.

Said purchasers and first mortgage bondholders of said Iron Railroad also except to the order discharging William J. Craig, Receiver, and pray an appeal therefrom, which exception and appeal are also allowed upon the giving of the bond for appeal hereinbefore provided for.

12.

All exceptions to the several reports of the masters heretofore filed herein and neither sustained in whole or in part by the above and foregoing decree are hereby overruled as to any and all matters herein determined.

All matters in any of these causes not finally disposed of by this or former decrees are hereby reserved for further determination.

251 13.

It is further ordered, adjudged and decreed that each of the said claims by this court determined and decreed to be paid shall draw interest at the rate of six per cent. per annum if the sums herein decreed to be paid shall not be paid to Noble C. Butler, clerk of the court at Indianapolis, within thirty (30) days from the filing and entry of this decree, from and after the expiration of said thirty days.

14.

It is further ordered that as to the claim of Post & Company,

which accrued after the first day of August, 1884, as shown in schedule of the reports of Masters Fishback and Ricks, filed March 10, 1887, shall be paid by the purchasers of the Toledo and St. Louis Divisions, and by agreement between said divisions the same is ordered to be paid by them jointly.

And the amounts decreed above in favor of Luce & Newton, and of Martha and George Stebbins are chargeable upon and shall be paid out of the proceeds of the Toledo Division.

To which purchaser Kneeland and other bondholders, his associates, except.

And the bondholders and purchasers of the Southeastern, the Dayton, the Cincinnati and the Cincinnati Northern Divisions, severally, except to paragraphs Nos. 3, 4, 5 and 7 of the foregoing decree and pray an appeal therefrom, which appeal is allowed upon their giving bond herein in the sum of $500.

It is ordered that this decree be entered in all the cases pending in the Sixth and Seventh Circuits.

It is further ordered that there be paid to A. D. Ricks, Special Master, for the stenographer's services, indexing and transcribing the evidence on the reference of Nov. 5th, 1885, the following sums, viz:

For taking 2,464 folios of testimony, 20c. . . .	$492.80
For making copy of same for filing in court at Toledo .	246.40
For per diem of stenographer for time boxing, binding testimony, etc., 4 per diems, $5.00 . . .	20.00
	769.20
252 It is further ordered that there shall be paid to R. R. Flood, stenographer, for drafting decree and making three copies thereof and for other stenographic services	28.00
It is further ordered that there be paid to Pomerene & Davis for stenographic services during the hearing of these causes	25.00

THE UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court. And I further certify that no exceptions were ever filed in this court, pursuant to the permission so to do, in said decree, to the allowance of the Iron Railroad claim as allowed by J. D. Cox, Master, in his report.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court, at the City of Cincinnati, Ohio, this 9th day of January, A.D. 1892.

B. R. COWEN, *Clerk.*
By ———— *Deputy Clerk.*

O. K. J. W. F. C.

253 **"K" 4.**

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

November Term, 1886, April 16th, A.D. 1887.
Before Honorable Walter Q. Gresham, and Honorable William A. Woods, Judges.

Grenville D. Braman,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company. } *No. 7,672, Chancery.*

The Central Trust Company of New New York, *et al.*,
vs.
The Toledo, Delphos and Burlington Railroad Company, *et al.* } *7,706, Chancery.*

Edward F. Leonard, *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *7,814, Chancery.*

These causes coming on to be further heard before the Hon. Walter Q. Gresham, Judge of the Seventh Judicial Circuit, Hon. Howell R. Jackson, Judge of the Sixth Judicial Circuit, and Hon. Martin Welker, District Judge of the Northern District of Ohio, sitting together upon the various masters' reports and evidence and exhibits filed herewith, and the several exceptions thereto, and upon questions reserved by the joint decree rendered October 1, 1886, and upon the application of the Receiver, William J. Craig, for additional compensation, and evidence heard by the court upon said application.

254 The several parties in interest having been duly notified of said joint hearing, and being present in person or by counsel, upon full argument the court, the said judges concurring, doth here now finally order, adjudge and decree as follows, touching the several matters hereinafter in this decree mentioned and set forth, to-wit:

1.

It is ordered, adjudged and decreed that all claims accrued during the six months prior to the receivership, known as six months' claims, of every character and description, however evidenced, be and the same are hereby rejected and disallowed, excepting only pay-rolls for the labor performed in the operation of the railroad during the six months next prior to the receivership, to-wit, unpaid payrolls for labor performed in the operation of the railroad during the months of February, March, April, May, June and July, A.D. 1883, which unpaid pay-rolls are to be paid out of the purchase-money funds arising from the sales of the several divisions of said railroad in the proportion and upon the percentages hereinafter in this decree set forth.

2.

Interest on all claims allowed by the court and ordered to be paid out of the proceeds of sale of the several divisions of said railroad, is disallowed, excepting only interest upon receivers' certificates as provided in the body of said certificates.

3.

All of the claims set forth in Exhibit "A," with report of Fishback and Ricks, Special Masters, filed March 10, 1887, excepting only the following, to-wit: Claim of Curtis and Brainard for one hundred and eighty-four (184) dollars, being claim No. 29 in said Exhibit "A," which is hereby rejected and disallowed, and excepting the claims of the Southeastern Division, the Dayton Division, the Cincinnati Division and the Iron Division, which are hereinafter specifically rejected and disallowed, are hereby allowed as to the amounts accrued between August 1, 1883, and August 1, 1884, as in said report and exhibit set forth; and the purchasers of said several divisions are hereby ordered, directed and decreed, within thirty (30) days from and after the entry of this decree, to pay into the registry of the Circuit Court of the United States for the District of Indi-
255 ana, a sum of money sufficient to pay and discharge the proportional part of said entire indebtedness as set forth in said Exhibit "A" and pay rolls, as provided in clause one of this decree — excepting the claims hereinabove excepted and disallowed — payable and charged against said several divisions upon the basis of percentages as herein decreed and set forth, subject to credits as provided in the 10th clause of this decree.

The names of the claimants, and the amount allowed to each claimant respectively, is set forth in said Exhibit "A," and is herein and hereby allowed and decreed to be paid, being the following, namely:

LIST OF CLAIMS ACCRUING BETWEEN AUGUST 1, 1883, AND AUGUST 1, 1884, ALLOWED BY MASTERS FISHBACK AND RICKS AND APPROVED BY COURT.

Arms, Bell & Co.	$141.20
Atlantic & Pacific Railway Co.	126.41
Bourn & Knowles Mfg. Co.	52.50
Bohanan, Wilson	83.20
Blitz & Son, Israel	334.13
Baugh Steam Forge Co.	1,184.66
Blade Printing and Paper Co.	2,979.11
Bostwick, Braum & Co.	2,379.76
Barker & Dwight	251.54
Butler & McCracken	368.49
Baltimore Iron & Copper Works	1,014.73
Bass Foundry & Machine Works	8,009.22
Buck & Co., M. M.	1,051.51
Bradford, Moses	242.50
Bain & Co., A. N.	310.67
Caniff, J. J.	10.50
Coit Co.	312.85
Cleveland Rubber Co.	140.00
Cleveland, Brown & Co.	2,910.44
Crerar, Adams & Co.	2,024.73
Comly & Co.	93.30
Campbell & Young	97.33
Cashman, William	8.00
Crow, Hagardine & Co.	63.64
Cary, C. C.	37.54
Cincinnati Ice Co.	15.25
256 Cleveland Co-operative Stove Co.	43.19
Canada Railway Co.	10.64
Chicago, St. Louis & P. R. R. Co.	148.07
Cammeyer & Sayer	25.00
Clark, B. S.	3.75
Durnell, A. N.	105.30
Diamond State Car Spring Co.	216.04
Delphos Light Bbl. Co.	25.00
Dodd, Jefferson	50.00
Dickson, Benjamin	65.00
Dawes, Samuel O.	500.00
Denny Stave Co.	30.40
Ellis, Thomas G.	40.00
Eureka Iron & Steel Works	909.32
Emma Coal Co.	798.74
Eaton & Co., Fred	228.97
French & Co., A.	285.84
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Fairbanks, Morse & Co.	36.30
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257 Keyser, Chauncey	150.00
Ketcham, D.	15.90
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Leve & Alden	275.00
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Murphey, John A.	190.66
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National Ry. Publishing Co.	128.58
North, Job	1,327.84
Newton & Luce, *et al.*	8,028.96
Martha & George Stebbins	3,969.87
N. Y., L. E. & W. Ry. Co.	2.57
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Outcalt, Miller	80.00
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Toledo Bee Co.	33.70
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Walker, J. W.	105.00
Waite, John A.	21.55
Whittaker, Haynes & Co.	248.87
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Walker, J. W.	22.50
Wilcox, M. F.	265.44
Wolf Coal & Mining Co.	66.66
Ward, J. B.	27.30
York & Hilsabeck	23.95

To which order and decree decreeing the payment into court of a sum of money sufficient to pay the portion of said claims distributed to the lines purchased by him, purchaser Kneeland excepts for himself and other first mortgage bondholders, his associates. And said Kneeland and his associates especially and specifically except to the ruling of the court requiring payment of the claims of Luce and Newton and Stebbins, as set forth in said Exhibit "A," filed March 10, 1887, with report of Masters Ricks and Fishback.

And said Luce and Newton and said Stebbins except to the disallowance of interest upon their claims.

And Post & Company and W. B. Morrow, admr., also except to the disallowance of interest upon the order in their favor, and pray an appeal, which the court allow and fix the bond at one thousand (1,000) dollars.

4.

The claim presented in behalf of the Southeastern Division, the Cincinnati Division and the Dayton Division for compensation for the transportation of coal over said divisions, and consumed in the ordinary operation of the entire system, upon other divisions of said system, is hereby rejected and disallowed, and the exceptions to the masters' reports allowing said claim are hereby sustained.

And said purchasers of said several divisions especially and specifically except to the ruling of the court in rejecting and disallowing said claim.

5.

260 It is further decreed that in addition to the sum of $3,671.85 heretofore paid to the Brooks Locomotive Works, by Receiver Dwight, upon the five locomotives delivered to said receiver by said Locomotive Works, there be and hereby is allowed and decreed to

be paid to said Brooks Locomotive Works, in full payment for said five locomotives, the further sum of thirty-three thousand, eight hundred and twenty-eight and 15-100 dollars ($33,828.15), said payment to be distributed to the several divisions upon the basis of percentages provided in the 7th clause of this decree, and with this modification of the masters' report on said claim the exceptions filed thereto by purchaser Kneeland are hereby overruled, and to this ruling and decree on said claim, report and exceptions thereto, purchaser Kneeland excepts.

And the purchaser of the Southeastern Division, Dayton Division, Cincinnati Division and the Cincinnati Northern Division, also excepts.

6.

It is further decreed that the claim of the Smith Bridge Company, amounting to the sum of twenty-four hundred and six and 15-100 ($2,406.15) dollars be and the same is hereby allowed. It is ordered and decreed that the said sum of twenty-four hundred and six and 15-100 (2,406.15) dollars, be paid to said Smith Bridge Company out of the proceeds of sale derived from the sale of the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois, in pursuance of the terms, conditions and requirements of the decree of foreclosure and sale of said St. Louis Division. This clause of this decree is entered by agreement and consent of the parties in interest, the said Smith Bridge Company consenting and agreeing in open court to accept in full satisfaction of said claim the principal thereof, without interest.

7.

It is further ordered, adjudged and decreed that all of the indebtedness of Receivers Dwight and Craig incurred from August 1, 1883, to August 1, 1884, except car and equipment rental, which has been provided for by former decrees entered in these causes,
261 and excepting such receivers' indebtedness incurred during said period from August 1, 1883, to August 1, 1884, as may be held and finally decreed to be a specific or local charge upon certain specified divisions of said railroad, shall be and the same is apportioned among the several divisions as follows:

	%
Dayton Division	12.98
Dayton and Southeastern Division	30.00
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division and Toledo Division, including Toledo Terminals	51.50

The apportionment of the St. Louis Division and Toledo Division, including the Toledo Terminals, is made in a simple percentage by agreement of all parties in interest.

8.

It is further ordered, adjudged and decreed that the claim of the Iron Railroad for forty-one thousand, seven hundred and forty-eight and 39-100 ($41,748.39) dollars, reported and allowed by Governor Cox, as Special Master, be and the same is hereby rejected and disallowed. The exceptions now allowed to be filed to the master's report, allowing said claim, are hereby sustained, and it is finally ordered, adjudged, and decreed that the said Iron Railroad, and the purchasers thereof at foreclosure sale, take nothing by said claim and proceedings thereunder. To which ruling, in disallowing and rejecting said claim, the purchasers of the Iron Railroad, and the bondholders holding bonds secured by the first mortgage upon said Iron Railroad, here now except by leave of the court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

9.

It is further ordered, adjudged and decreed that the claim for additional compensation for services as receiver presented by William J. Craig, be and the same is hereby rejected and disallowed. It is further ordered and decreed that the amounts heretofore received by said Craig as receiver shall be and are hereby decreed to be a full payment and compensation for all his services as such receiver,
262 and it is further ordered and decreed that the said Craig be and he is hereby fully and finally discharged of and from all liability of his trust as such receiver. Said receiver's compensation to be distributed to the several divisions upon the basis of percentage set forth in the 7th clause of this decree.

10.

In making payment of their distributive portion of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884, as provided in the 7th clause of this decree, the purchaser or purchasers of the several divisions shall be entitled to and shall receive credit as between itself and all other divisions upon his or their distributive portion of said indebtedness, for the amount already heretofore paid by him or them upon and in payment of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884.

It is further hereby ordered that any purchaser in paying into the registry of the court his distributive share of said receivers' indebtedness incurred from August 1, 1883, to August 1, 1884, shall have credit upon his said distributive share for all of such indebtedness already paid by him, or by the receiver of the division or divisions purchased by him after August 1, 1884, upon producing the vouchers evidencing such payment.

11.

It is further ordered, adjudged and decreed that the Iron Railroad pay, in accordance with the finding and report of Master J. D. Cox, for car rentals and repair and loss of rolling stock, one and 98-100 per cent. of the total amount which may be owing from car rentals and loss and repair of rolling stock by the Toledo, Cincinnati & St. Louis Railroad Company for the period during which said Iron Railroad was in the hands of the receiver appointed in this cause.

To which judgment and decree the purchasers and first mortgage bondholders of the Iron Railroad except and pray an appeal, which exception and appeal are allowed by this court.

Said purchasers and first mortgage bondholders of said Iron Railroad also except to the order discharging William J. Craig, Receiver, and pray an appeal therefrom, which exceptions and appeal are also allowed upon the giving of the bond for appeal hereinbefore provided for.

263 12.

All exceptions to the several reports of the masters heretofore filed herein and neither sustained in whole or in part by the above and foregoing decree, are hereby overruled as to any and all matters herein determined.

All matters in any of these causes not finally disposed of by this or former decrees, are hereby reserved for further determination.

13.

It is further ordered, adjudged and decreed that each of the said claims by this court determined and decreed to be paid shall draw interest at the rate of six per cent. per annum if the sums herein decreed to be paid shall not be paid to Noble C. Butler, Clerk of the Court at Indianapolis, within thirty (30) days from the filing and entry of this decree, from and after the expiration of said thirty days.

14.

It is further ordered that as to the claim of Post & Company, which accrued after the first day of August, 1884, as shown in schedule of the reports of Masters Fishback and Ricks, filed March 10, 1887, shall be paid by the purchasers of the Toledo and St. Louis Divisions, and by agreement between said divisions the same is ordered to be paid by them jointly.

And the amounts decreed above in favor of Luce & Newton and of Martha and George Stebbins are chargeable upon and shall be paid out of the proceeds of the Toledo Division.

To which purchaser Kneeland and other bondholders, his associates, except.

And the bondholders and purchasers of the Southeastern, the Dayton, the Cincinnati and the Cincinnati Northern Divisions severally except to paragraphs Nos. 3, 4, 5 and 7 of the foregoing decree, and

pray an appeal therefrom, which appeal is allowed upon their giving bond herein in the sum of $500.

264 It is ordered that this decree be entered in all the causes pending in the Sixth and Seventh Circuits.

It is further ordered that there be paid to A. J. Ricks, Special Master, for the stenographer's services indexing and transcribing the evidence on the reference of November 5th, 1885, the following sums, viz.:

For taking 2,464 folios of testimony, at 20c. . .	492.80
For making copy of same for filing in court at Toledo .	246.40
For per diem of stenographer for time boxing, binding testimony, &c., 4 per diems, at $5	20.00
	$759.20

It is further ordered that there shall be paid R. P. Flood, stenographer, for drafting decree and making three copies thereof and for other stenographic services, $28.00.

And it is further ordered that there be paid to Pomerene & Davis for stenographic services during the hearing of these cases, $25.00.

265 District of Indiana.

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the decree entered in said court on the 16th day of April, 1887, in the above entitled causes, as fully as the same appears of record in my office.

Witness my hand and seal of said court, this 14th day of November, 1891.

Noble C. Butler, *Clerk.*

District of Indiana.

I, William A. Woods, Judge of the District Court of the United States for said district, do certify that at the date of the foregoing certificate Noble C. Butler was, and now is, the Clerk of the Circuit Court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand this 14th day of November, 1891.

W. A. Woods, *Judge.*

266 **"L" 4.**

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

At a stated term of the Circuit Court of the United States, within and for the Western Division of the Northern District of Ohio, begun and held at the City of Toledo, in said district, on the first Tuesday in December, being the seventh day of said month, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and eleventh.

Present, the Honorable Martin Welker, District Judge.

Monday, June 6th, 1887, among the proceedings then and there had were the following, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIST. OF OHIO, WESTERN DIVISION, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, DISTRICT OF INDIANA AND SOUTHERN DISTRICT OF ILLINOIS.

Grenville D. Braman, *vs.* The Toledo, Cincinnati & St. Louis.	*366.*	Northern Dist. of Ohio, Western Division.
Grenville D. Braman, *vs.* The Toledo, Cincinnati & St. Louis Railroad.		Dist. of Indiana.
Grenville D. Braman, *vs.* The Toledo, Cincinnati & St. Louis Railroad Company and others.		Dist. Illinois.
267 The Central Trust Company of New York, *vs.* The Toledo, Cincinnati & St. Louis.	*3,554.*	
The Central Trust Co. of New York, *vs.* The Toledo, Delphos & Burlington Railroad Company and others.	*3,576.* *3,577.* *3,578.*	Southern District of Ohio, Western Division.

The Central Trust Co. of New York,
vs.
Iron Railroad Co. and others. } *3,579.*

The Central Trust Co. of New York and others,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company and others. } Consolidated cause. Dist. of Indiana.

The Central Trust Co., of N.Y.,
vs.
Toledo, Delphos & Burlington Railroad Company and others.

The Central Trust Co., of New York,
vs.
The Toledo, Delphos & Burlington Railroad Company and others. } Northern District of Ohio, Western Division.

These causes coming on to be further heard before the Hon. Walter Q. Gresham, Judge of the Seventh Judicial Circuit, Hon. Howell E. Jackson, Judge of the Sixth Judicial Circuit, and Hon. Martin Welker, District Judge of the Northern District of Ohio, sitting together upon the various masters' reports and evidence and exhibits filed therewith, and the several exceptions thereto, and upon questions reserved by the joint decree rendered October 1, 1886, and upon the application of the Receiver, William J. Craig, for additional compensation, and evidence heard by the court upon said application.

268 The several parties in interest having been duly notified of said joint hearing, and being present in person or by counsel, upon full argument the court, the said judges concurring, doth here now finally order, adjudge and decree as follows, touching the several matters hereinafter in this decree mentioned and set forth, to-wit:

1st: It is ordered, adjudged and decreed that all claims accrued during the six months prior to the receivership, known as the six months' claims, of every character and description, however evidenced, be and the same are hereby rejected and disallowed, excepting only pay-rolls for the labor preformed in the operation of the railroad during the six months next prior to the receivership, to-wit: Unpaid pay-rolls for labor performed in the operation of the railroad during the months of February, March, April, May, June and July, A.D. 1883, which unpaid pay-rolls are to be paid out of the purchase-money funds arising from the sales of the several divisions of said railroad, in the proportion and upon the percentages hereinafter in this decree set forth.

2nd: Interest on all claims allowed by the court and ordered to

be paid out of the proceeds of the sale of the several divisions of said railroad, is disallowed, excepting only interest upon the receivers' certificates as provided in the body of said certificates.

3rd: All of the claims set forth in Exhibit "A," with report of Fishback and Ricks, Special Masters, filed March 10th, 1887, excepting only the following, to wit: Claim of Curtis and Brainard for one hundred and eighty-four ($184.00) dollars, being claim 29, in said Exhibit "A," which is hereby rejected and disallowed, and excepting the claims of the Southeastern Division, the Dayton Division, the Cincinnati Division and the Iron Division, which are hereinafter specifically rejected and disallowed, are hereby allowed as to the amounts accrued between August 1, 1883, and August 1, 1884, as in said report and exhibit set forth; and the purchasers of said several divisions are hereby ordered, directed and decreed, within thirty (30) days from and after the entry of this decree, to pay into the registry of the Circuit Court of the United States for the District of Indiana, a sum of money sufficient to pay and discharge the proportional part of said entire indebtedness as set forth in said Exhibit "A" and pay-rolls, as provided in clause one of this decree—excepting the claims hereinabove excepted and disallowed—payable by and charged against said several divisions upon the basis of percentages as herein directed and set forth, subject to credits as provided in the 10th clause of this decree.

269 The names of the claimants, and amount allowed to each claimant respectively, is set forth in Exhibit "A," and is herein and hereby allowed and decreed to be paid, being the following, namely:

List of Claims Accruing between August 1, 1883, and August 1, 1884, Allowed by Masters Fishback and Ricks, Approved by Court.

Arms, Bell & Co.	$141.20
Atlantic & Pacific Railway Co.	126.41
Bourne & Knowder Mfg. Co.	52.50
Bohanan, Wilson	83.20
Blitz & Son, Israel	334.13
Baugh Steam Forge Co.	1,184.66
Blade Printing & Paper Co.	2,979.11
Bostwick, Braum & Co.	2,379.76
Barker, Dwight	251.54
Butler & McCracken	368.49
Baltimore Iron & Copper Works	1,014.73
Bass Foundry & Machine Works	8,009.22
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Wolfe Coal & Mining Co.	66.66
Ward, J. B.	27.30
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the lines purchased by him, purchaser Kneeland excepts for himself and other first mortgage bondholders, his associates. And said Kneeland, and his associates especially and specifically, except to the ruling of the court requiring payment of the claims of Luce & Newton and Stebbins, as set forth in said Exhibit "A," filed March 10th, 1887, with report of Masters Ricks and Fishback.

And said Luce & Newton and said Stebbins except to the disallowance of interest upon their claims.

And Post & Co. and W. B. Morrow, admr., also except to the disallowance of interest upon the order in their favor, and pray an appeal, which the court allow and fix the bond at one thousand ($1,000.00) dollars.

4th: The claim presented in behalf of the Southeastern Division, the Cincinnati Division and the Dayton Division for compensation for the transportation of coal over said divisions, and consumed in the ordinary operation of the entire system, upon other divisions of said system, is hereby rejected and disallowed, and the exceptions to the masters' reports allowing said claim are hereby sustained.

And said purchasers of said several divisions especially and specifically except to the ruling of the court in rejecting and disallowing said claim.

5th: It is further decreed that in addition to the sum of $3,671.85 heretofore paid to the Brooks Locomotive Works, by Receiver Dwight, upon the five locomotives delivered to said receiver by said Locomotive Works, there be and is hereby allowed and decreed to be paid to said Brooks Locomotive Works, in full payment for said five locomotives, the further sum of thirty-three thousand, eight hundred and twenty-eight and 15-100 dollars ($33,828.15), said payment to be distributed to the several divisions upon the basis of percentages provided in the 7th clause of this decree, and with this modification of the master's report on the said claim, the exceptions filed thereto by purchaser Kneeland are hereby overruled, and to this ruling and decree on said claim, report and exception thereto, purchaser Kneeland excepts.

And the purchasers of the Southeastern Division, Dayton Division, Cincinnati Division and the Cincinnati Northern Division also except.

274 6th: It is further decreed that the claim of the Smith Bridge Company, amounting to the sum of twenty-four hundred and six and 15-100 ($2,406.15) dollars, be and the same is hereby allowed. It is ordered and decreed that the said sum of twenty-four hundred and six and 15-100 ($2,406.15) dollars be paid to said Smith Bridge Company out of the proceeds of sale derived from the sale of the St. Louis Division, extending from Kokomo, Indiana, to East St. Louis, Illinois, in pursuance of the terms, conditions and requirements of the decree of the foreclosure and sale of said St. Louis Division. This clause of this decree is entered by agreement

and consent of the parties in interest, the said Smith Bridge Company consenting and agreeing in open court to accept in full satisfaction of said claim the principal thereof without interest.

7th: It is further ordered, adjudged and decreed that all of the indebtedness of Receivers Dwight and Craig incurred from August 1, 1883, to August 1, 1884, excepting car and equipment rental, which has been provided for by former decrees entered in these cases, and excepting such receivers' indebtedness incurred during said period from August 1, 1883, to August 1, 1884, as may be held and finally decreed to be a specific or local charge upon certain specific divisions of said railroad — shall be, and the same is, apportioned among the several divisions as follows:

Dayton Division	12.98%
Dayton & Southeastern Division	30.00
Cincinnati Division	1.36
Cincinnati Northern Division	4.16
St. Louis Division and Toledo Division, including Toledo Terminals	51.50

The apportionment of the St. Louis Division and Toledo Division, including the Toledo Terminals, is made in a single percentage by agreement of all parties in interest.

8th: It is further ordered, adjudged and decreed that the claim of the Iron Railroad for forty-one thousand, seven hundred and forty-eight and 39–100 ($41,748.39) dollars reported and allowed by Governor Cox, as Special Master, be and the same is hereby rejected and disallowed. The exceptions now allowed to be filed to the master's report allowing said claim are hereby sustained, and it is finally ordered, adjudged and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale take noth-
275 ing by said claim and proceeding thereunder. To which ruling, in disallowing and rejecting said claim, the purchasers of the Iron Railroad and the bondholders holding bonds secured by the first mortgage upon said Iron Railroad here now except by leave of the court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

9th: It is further ordered, adjudged and decreed that the claim for additional compensation for the service as receiver presented by William J. Craig, be and the same is hereby rejected and disallowed. It is further ordered and decreed that the amounts heretofore received by said Craig, as receiver, shall be and are hereby decreed to be a full payment and compensation for all his services as such receiver, and it is further ordered and decreed that the said Craig be and he is hereby fully and finally discharged of and from

all liability of his trust as such receiver. Said receiver's compensation to be distributed to the several divisions upon the basis of percentage set forth in the 7th clause of this decree.

10th: In making payment of their distributive portion of indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884, as provided in the 7th clause of this decree, the purchaser or purchasers of the several divisions shall be entitled to and shall receive credit as between itself and all other divisions upon his or their distributive portion of said indebtedness for the amount already heretofore paid by him or them upon and in payment of such indebtedness of the receivership incurred from August 1, 1883, to August 1, 1884.

It is further hereby ordered that any purchaser in paying into the registry of the court his distributive share of said receivers' indebtedness incurred from August 1, 1883, to August 1, 1884, shall have credit upon his said distributive share for all of such indebtedness already paid by him, or by the receiver of the division or divisions purchased by him after August 1, 1884, upon producing the vouchers evidencing such payments.

11th: It is further adjuged and decreed that the Iron Railroad pay in accordance with the finding and report of Master J. D. Cox for car rentals and repair and loss of rolling stock one and 9-100 276 per cent. of the total amount which may be owing from car rentals and loss and repairs of rolling stock by the Toledo, Cincinnati & St. Louis Railroad Company for the period during which said Iron Railroad was in the hands of the receiver appointed in this cause.

To which judgment and decree the purchasers and first mortgage bondholders of the Iron Railroad except and pray an appeal, which exception and appeal are allowed by this court.

Said purchasers and first mortgage bondholders of said Iron Railroad also except to the order discharging William J. Craig, Receiver, and pray an appeal therefrom, which exception and appeal are also allowed upon the giving of the bond for appeal hereinbefore provided for.

12th: All exceptions to the several reports of the masters heretofore filed herein, and neither sustained in whole or in part by the above and foregoing decree, are hereby overruled as to any and all matters herein determined.

All matters in any of these cases not finally disposed of by this or former decrees are hereby reserved for further determination.

13th: It is further ordered, adjudged and decreed that each of said claims by this court determined and decreed to be paid shall draw interest at the rate of six per cent. per annum if the sums herein decreed to be paid shall not be paid to Noble Butler, Clerk of the Court at Indianapolis, within thirty (30) days from the filing and entry of this decree, from and after the expiration of said thirty days.

14th: It is further ordered that as to the claim of Post & Company, which accrued after the first day of August, 1884, as shown in schedule of the reports of Masters Fishback and Ricks, filed March 10, 1887, shall be paid by the purchasers of the Toledo and St. Louis Divisions, and by agreement between said divisions the same is ordered to be paid by them jointly.

And the amounts decreed above in favor of Luce & Newton and of Martha and George Stebbins are chargeable upon and shall be paid out of the proceeds of the Toledo Divisions.

To which purchaser Kneeland and other bondholders, his associates, except.

277 And the bondholders and purchasers of the Southeastern, the Dayton, the Cincinnati and the Cincinnati Northern Divisions severally except to paragraphs Nos. 3, 4, 5, and 7 of the foregoing decree, and pray an appeal therefrom, which appeal is allowed upon their giving bond herein in the sum of $500.

It is ordered that this decree be entered in all the causes pending in the Sixth and Seventh Circuits.

It is further ordered that there be paid to A. J. Ricks, Special Master, for the stenographer's services indexing and transcribing the evidence on the reference of November 5th, 1885, the following sums, viz:

For taking 2,464 folios of testimony at 20 cts. . .	$492.80
For making copy of same for filing in court at Toledo .	246.40
For per diem of stenographer for time boxing and binding testimony, to 4 per diems at $5.00	20.00
	759.20

It is further ordered that there shall be paid R. P. Flood, stenographer, for drafting decree and making the copies thereof for other stenographic services, $28.00.

It is further ordered that there be paid to Pomerene & Davis for stenographic services during the hearing of these cases the sum of twenty-five dollars.

To the ruling and decree on said claim, in so far as the same excludes the interest from the time of the purchase made on the 28th day of August, 1883, and from that time up to the finding of the master on December 6th, 1885, and from the filing of the exceptions to the report of said master on March 13th, 1886, and up to the time of the determination and overruling of said exceptions on April 7th, 1887, the said Brooks Locomotive Works excepts and prays an appeal therefrom, which appeal is allowed upon their giving bond herein in the sum of $500.

The above entry is approved and directed to be entered as a part of the decree in the other entitled causes.

HOWELL E. JACKSON,
Circuit Judge.

April 19, 1887.

278 THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION. } ss.

I, Irvin Belford, Clerk of the Circuit Court of the United States, within and for said district, do hereby certify that the within is a true copy of a decree entered upon the journal of the proceedings of said court in the therein entitled cause; that I have compared the same with the original entry of said decree and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Toledo, in said district, this seventeenth day of December, A.D. 1891, and in the 116th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*

[SEAL] By MOLLIE W. BROWN, *Deputy Clerk.*

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279 And afterwards, to-wit: at the November term, 1892, of said Circuit Court of the United States for the District of Indiana, in recess thereof, the following further proceedings in the above entitled causes were had, to-wit:

Comes now Sylvester H. Kneeland for himself and other bondholders, by R. G. Ingersoll and Clarence Brown, their solicitors, and file their motion to strike from the files the petition and amended petition for rehearing of the Iron Railroad, and also file their demurrer to the amended and supplemental petition for rehearing of the Iron Railroad; which demurrer is in the words following, to-wit:

DEMURRER

of the bondholders and purchasers of the Toledo, Delphos and Burlington Railroad, and of the Toledo, Cincinnati and St. Louis Railroad, to the amended and supplemental petition for rehearing, filed herein by the purchasers and bondholders of the Iron Railroad, on the 29th day of February, 1892.

These defendants, the bondholders and purchasers of the Toledo, Delphos and Burlington Railroad, and of the Toledo, Cincinnati and St. Louis Railroad, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition for rehearing to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that said petitioners have not, by their said petition, made such a case as entitles them in a court of equity to relief from or against these defendants, touching the matters contained in the said petition or any of such matters.

And further that it appears by said petitioners' own showing, by their said petition, that said petitioners are not entitled to the relief prayed for by their said petition against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said petition, defendants demur to said petition,
280 and to all the matters and things therein contained, and humbly pray of this honorable court whether they shall be compelled to make any other or further answer to the said petition, and they pray to be hence dismissed with their costs in this behalf sustained.

We certify that in our opinion the foregoing demurrer is well founded in law, and proper to be filed in the above causes.

SYLVESTER H. KNEELAND,
for himself and other bondholders.

By R. G. INGERSOLL, and
CLARENCE BROWN,
Solicitors and Defendants.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
STATE OF OHIO, LUCAS COUNTY. } ss.

Clarence Brown, being duly sworn, says that he is one of the solicitors of the purchasers and bondholders, defendants as aforesaid, and that said defendants are now absent from and non-residents of the district and State aforesaid, for which reason he makes this affidavit. Affiant says he has read the foregoing demurrer, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

CLARENCE BROWN.

Sworn to before me, and subscribed in my presence this 23rd day of January, 1893.

JOHN R. CALDER,
Notary Public, Lucas County, Ohio.

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281 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

November Term, 1892, January 28th, A.D. 1893.

Before Honorable John H. Baker, Judge.

The following order approved by Honorable Walter Q. Gresham, Circuit Judge, was this day received from him and is directed to be entered of record:

Grenville D. Braman,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,672. Chancery.*

The Central Trust Company of New York, *et al.*,
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706. Chancery.*

Edward F. Leonard, *et al.*,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,814. Chancery.*

These causes came on this day to be further heard upon the petition and amended petition for rehearing of the purchasers and bondholders of the Iron Railroad and the demurrer thereto.

And the same having been submitted to the court, and the court having heard the arguments of counsel, and being now fully advised in the premises, finds that said demurrer is well founded.

It is therefore ordered, adjudged and decreed that said demurrer be and the same is hereby sustained, and that said petition
282 and amended petition for rehearing be and the same hereby are dismissed, and that said defendants recover their costs.

To which orders, judgments and decrees said petitioners except, and pray an appeal to the Circuit Court of Appeals, which is allowed upon petitioners executing a bond for such appeal to the satisfaction of this court in the sum of one thousand dollars.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of a decree entered in said court on the 28th day of January, 1893, in the above entitled causes, as fully as the same appears of record in my office.

Witness my hand and the seal of said court at Indianapolis, in said district, this 25th day of April, A.D. 1893.

[SEAL] NOBLE C. BUTLER, *Clerk.*

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283 And afterwards, to-wit: at the November Term, 1892, of said court, on the 6th day of March, 1893, before the Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to-wit:

Come now the bondholders and purchasers of the Iron Railroad, by John C. Coombs and Gustavus H. Wald, their solicitors, and file their prayer for an appeal herein, in the words following, to-wit:

To the Judges of the Circuit Court of the United States for the District of Indiana:

The bondholders and purchasers of the Iron Railroad, petitioners in the above-entitled causes, conceiving themselves aggrieved by the order and decree entered therein on the 28th day of January, A.D. 1893, do hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Seventh Circuit, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said Circuit Court of Appeals.

JOHN C. COOMBS,
GUSTAVUS H. WALD,
Attorneys for the Petitioners and Appellants, the Bondholders and Purchasers of the Iron Railroad.

And now, to-wit: on the 6th day of March, 1893, it is ordered that the appeal be allowed as prayed for.

W. A. WOODS,
United States Circuit Judge, Seventh Judicial Circuit.

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284 And thereupon it is ordered by the court that the prayer for appeal be granted, and the appeal be and the same is hereby allowed as prayed for, and thereupon said appellants file their appeal bond herein in the sum of one thousand dollars, with Charles R. Batt as principal, and A. A. McKain as surety, which bond is approved by the court, and is in the words following, to-wit:

Know all men by these presents, that we, Charles R. Batt, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, as principal, and A. A. McKain, of Indianapolis, in the County of Marion and State of Indiana, as surety, are held and firmly bound unto Sylvester H. Kneeland, in the full and just sum of one thousand dollars, to be paid to the said Sylvester H. Kneeland, his executors, administrators or assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this third day of March, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, in the above-entitled causes a decree was lately entered against the said Charles R. Batt and others, petitioners, bondholders

and purchasers of the Iron Railroad, and the said petitioners having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the decree in the aforesaid causes, and a citation directed to the said Sylvester H. Kneeland, citing and admonishing him and other bondholders and purchasers of the Toledo, Delphos and Burlington Railroad, and of the Toledo, Cincinnati and St. Louis Railroad, respondents, to be and appear in the said United States Circuit Court of Appeals for the Seventh Circuit, in the City of Chicago, Illinois, on the 6th day of April, A.D. 1893:

Now, the condition of the above obligation is such, that, if the said Charles R. Batt and others, appellants, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation is to be void; else to remain in full force and virtue.

CHAS. R. BATT, [SEAL]
ARTHUR A. MCKAIN, [SEAL]

285 COMMONWEALTH OF MASSACHUSETTS, } ss.
COUNTY OF SUFFOLK. }

Boston, March 3d, 1893. Personally appeared the above named Charles R. Batt, and acknowledged that he had executed the foregoing bond, before me,

CHAS. F. THAYER, [SEAL]
Notary Public.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

Personally came Arthur A. McKain on this sixth day of March, 1893, and acknowledged the execution of the foregoing bond before me.

NOBLE C. BUTLER,
Clerk U. S. Circuit Court of Indiana.

Approved this March 6, 1893.

W. A. WOODS.

286 IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

Grenville D. Braman,
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *No. 7,672.*

The Central Trust Company of New York, *et al.*
vs.
The Toledo, Delphos & Burlington Railroad Company, *et al.* } *No. 7,706.*

Central Trust Company of New York, Edward F. Leonard, *et al.*
vs.
The Toledo, Cincinnati & St. Louis Railroad Company, *et al.* } *Nos. 7,814 and 7,815. Consolidated Causes.*

ASSIGNMENT OF ERRORS.

And now, to-wit, on this 6th day of March, 1893, in the same term, before the Judges of the Circuit Court of the United States for the District of Indiana, come the said bondholders and purchasers of the Iron Railroad, appellants, by John C. Coombs and Gustavus H. Wald, their attorneys, and say that in this record and the proceedings in the above entitled matter there is a manifest error in this, to-wit:

1. That the said Circuit Court of the United States for the District of Indiana erred in sustaining the demurrer of the bondholders and purchasers of the Toledo, Delphos and Burlington Railroad and of the Toledo, Cincinnati and St. Louis Railroad to the petition of the bondholders and purchasers of the Iron Railroad.

2. That the said court erred in dismissing the said petition.

3. That the said court erred in sustaining the said demurrer and in dismissing the said petition.

287 4. That the said court, having allowed the said petition for rehearing by the order of Nov. 8, 1889, and in view of the proceedings prior thereto in relation to said claim and of those had in pursuance of said order, should have passed upon and established the liability of said Toledo and of said St. Louis Divisions, and of the bondholders and purchasers of said divisions respectively, for their proportionate part of said Iron Railroad claim.

5. That the said court erred in refusing to pass upon the petitioners' said "Petition and Claim No. 69*a*" and in dismissing the said petitioners from said causes without passing on said petition and claim.

6. That the said court erred in deciding that the facts set forth in said petition for rehearing, so called, do not constitute sufficient ground for vacating said alleged decree of April 16, 1887.

7. That the said court should have vacated the said alleged decree as absolutely null and void because the said decree as rendered was one entirely outside of and unsupported by the pleadings in the said causes, no such exceptions to the master's report as said decree purported to allow to be filed and to sustain having been actually filed, either at the time of the passage or entry of said decree, or afterwards during same term.

8. That the said court should have held the alleged entry of exceptions at the next term, to-wit, June 28, 1887, *nunc pro tunc* as of April 16, 1887, without the knowledge or consent of these petitioners and appellants, to be a mere nullity, inoperative and of no effect; since to make such entry effective the record must show that the delay was the act of the court or of its officers; whereas, the record in fact shows that the delay was not the act of the court or of its officers, but was wholly the act of the respondents themselves.

9. That the said court should have held that any filing of exceptions at the next term, to-wit, on June 28, 1887, without the knowledge or consent of these petitioners and appellants, would have been a mere nullity, inoperative and of no effect; since at that time, under Equity Rule 83, the said master's report stood confirmed for want of exceptions thereto; and the court had no power thereafter to allow exceptions to be filed, unless on petition therefor, supported by affidavit or other proof, and alleging such facts, if any, as would take the case out of Rule 83. No such petition was filed or facts proved.

288 10. That the said court should have vacated the said decree as absolutely null and void, because the matter in the manner and form as therein passed upon was not a matter presented by the pleadings in the said causes, or within the jurisdiction of the said Circuit Court of the United States for the District of Indiana.

11. That the said court should have vacated the said decree as one improvidently and inadvertently made and entered, or as only evidence of the decree of April 12, 1887, in the said Circuit Court of the United States for the Southern District of Ohio, Western Division, which decree has been vacated and annulled as one improvidently and inadvertently made and entered, the Iron Railroad claim in the manner and form as therein passed upon being *res adjudicata*. The decree of Judge Sage, of Feb. 29, 1887, overruling all exceptions to the said master's report and confirming the same and establishing the said claim, was entered at a term which ended before the hearing at Cleveland at which said decree of April 12, 1887, and of April 16, 1887, were made.

12. That the said court should have vacated the said decree on the ground that as an entry of the Cleveland decree, so called, it

has been reversed on a petition for rehearing, filed seasonably and in the only place contemplated in said decree for the filing of said petition argued by all the parties in interest, including these respondents, and heard and determined by or with the consent of all the judges who united in pronouncing said decree at Cleveland.

Wherefore the said bondholders and purchasers of the Iron Railroad pray that the said decree entered herein against them be reversed, and that they have the relief prayed for in their said petition and in their said petition and claim No. 69*a*, or such other and further relief as the nature and circumstances of the case may require and to the court shall seem meeet.

JOHN C. COOMBS,
GUSTAVUS H. WALD,
Attorneys for the Petitioners and Appellants, the bondholders and purchasers of the Iron Railroad.

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289 UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for the district aforesaid, do hereby certify that the above and foregoing are full and true copies of (1) the petition for rehearing as amended: (2) exhibits marked as follows: B to D inclusive, part of J, K, L, E2 to H2 inclusive; K2, Q2, R2, V2 to X2 inclusive; Z2 to E3 inclusive; J3 to L3 inclusive; V3 to Y3 inclusive; A4 to G4 inclusive; J4 to L4 inclusive; (3) the demurrer of the Toledo, Delphos & Burlington Railroad and The Toledo, Cincinnati & St. Louis Railroad; (4) the decree of January 28th, 1893; (5) the prayer for appeal; (6) the appeal bond and (7) the assignment of errors, in the causes of Grenville D. Braman *vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*, The Central Trust Company of New York *et al. vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*, and the Central Trust Company of New York, and Edward F. Leonard, *et al.*, *vs.* The Toledo, Cincinnati & St. Louis Railroad Company, *et al.*; in the matter of the petition of the bondholders and purchasers of the Iron Railroad; as fully as the same remain upon the files and records now in my office.

Witness my hand and the seal of said court at Indianapolis in said district, this 4th day of April, 1893.

[SEAL] NOBLE C. BUTLER, *Clerk.*

290 IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Grenville D. Braman,
vs.
T., C. & St. L. R. R. Co., *et al.* } *No. 7,672.*

Central Trust Co., *et al.*
vs.
T., D. & B. R. R. Co., *et al.* } *No. 7,706.*

Central Trust Co.
Edward F. Leonard, *et al.*
vs.
T., C. & St. L. R. R. Co., *et al.* } *No. 7,814 and 7,815. Consolidated causes.*

STIPULATION AS TO PRINTING.

Under and by virtue of Rule 23 of this Honorable Court, it is hereby stipulated by and between the parties that the following parts of the record in the above entitled causes shall be printed:

(1) "Petition for Rehearing as Amended."

(2) Exhibits marked as follows, to-wit:

B. (only one, preferably Ind. app't); C (only one, pref. that from Ind.); D, & H; J (only app't of Craig in Iron R. R. case); K, & L; E 2 (only two, pref. those in So. Dist. of Ohio and in Ind.); 2d E 2 to H 2 inclu.; K 2, Q 2 & R 2; V 2 to X 2 inclu.; Z 2 to E 3 inclu.; J 3 to L 3 inclu.; V 3 to Y 3 inclu.; A 4 to G 4 inclu.; and J 4 to L 4 inclu.

(3) Demurrer of the T., D. & B. R. R. and the T., C. & St. L. R. R.

291 (4) Decree of Jan. 28, 1893.

(5) Assignment of Errors.

In case it shall at any time appear that any part of the record upon which either party relies has not been printed, then both parties shall unite in asking the court to direct that the same be printed in proper time for use upon the hearing.

JOHN C. COOMBS,
GUSTAVUS H. WALD,
Attorneys for the Appellants.

ROBERT G. INGERSOLL, *B.*
CLARENCE BROWN,
Attorneys for the Appellees.

[Endorsed]: Filed May 15, 1893.

OLIVER T. MORTON, *Clerk.*

292 FRIDAY, April 28, 1893.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge.

106. Bondholders and Purchasers of Iron Railroad
vs.
Toledo, Cincinnati and St. Louis Railroad Company.
} Appeal from U. S. Circuit Court for the District of Indiana.

In the above entitled cause, it having been made to appear that the transcript sent up from the Circuit Court for the District of Indiana is defective in certain respects as follows: in the omission therefrom of a copy of the decree of said Circuit Court for the
293 District of Indiana under date of January 28, 1893, the same being the decree appealed from.

And in the omission from a copy of a certain order or decree passed by said Circuit Court on the eighth day of November, 1889, of the following words:

"Same is hereby allowed, and by agreement of counsel in open court, it is further ordered that said petition be and the," which decree is marked "Y 3" in said transcript.

Which errors and omissions appear from independently certified copies of said decree, one of which, dated January 28, 1893, is
294 hereby ordered to be printed in its proper place in said transcript, and the other, to-wit, said order and decree of November 8, 1889, is ordered to be placed on file in said cause herewith.

Now, therefore, it is ordered that said omitted decree of January 28, 1893, and said omitted words from said order or decree of November 8, 1889, be incorporated and printed in their proper places in the transcript of said cause and taken to be as and for proper parts thereof.

It is also ordered that obvious clerical mistakes in said records
295 wherein a wrong letter or two may appear in the names of Charles R. Batt or John C. Coombs may be corrected in the printing of said transcript.

296 MONDAY, October 2, 1893.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge.

106. Bondholders and Purchasers of the Iron Railroad,
vs.
Toledo, Delphos and Burlington Railroad Company, and Toledo, Cincinnati and St. Louis Railroad Company.

It is ordered by the court that this cause be and the same is hereby set down for hearing Thursday, October 20, 1893.

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297 WEDNESDAY, October 18, 1893.

Before Hon. William A. Woods, Circuit Judge.

106. Bondholders and Purchasers of the Iron Railroad,
vs.
Toledo, Delphos and Burlington Railroad Company *et al.*

It is ordered by the Court that this cause be, and the same is hereby reset for hearing for November 6, 1893.

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298 MONDAY, November 6, 1893.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. Romanzo Bunn, District Judge.

106. Bondholders and Purchasers of the Iron Railroad,
vs.
Toledo, Delphos and Burlington Railroad Company, *et al.*

Now this day came the parties by their counsel, and this cause now comes on to be heard upon the printed record and briefs of counsel, and on oral argument by Mr. Charles H. Hanson and Mr.

Gustavus Wald, counsel for appellants, and Mr. Clarence
299 Brown, counsel for appellees, and the court having heard the same takes this matter under advisement.

On motion of Mr. John C. Coombs, counsel for appellants, in above entitled cause, it is ordered by the court that the appellants may and are hereby allowed to file new briefs in this cause.

SATURDAY, January 20, 1894.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. Romanzo Bunn, District Judge.

106. Bondholders and Purchasers of the Iron Railroad,
vs.
300 Toledo, Delphos and Burlington Railroad Company and the Toledo, Cincinnati and St. Louis Railroad Company.

Appeal from the Circuit Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that this appeal be and the same is hereby dismissed at the costs of appellants.

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301 UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 106 — October Term, 1893.

Bondholders and Purchasers of the Iron Railroad,
vs.
The Toledo, Delphos and Burlington Railroad Company, *et al.*

Appeal from the United States Circuit Court for the District of Indiana.

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

This appeal is from an order refusing an application for a rehearing. The Iron Railroad, situated entirely in the Southern District of Ohio, was a constituent part of the Toledo, Cincinnati and St.

Louis Railroad, which in August, 1883, was put into the hands of a receiver by orders of the United States Circuit Court for the Southern District of Illinois, for Indiana, and for the Western Division of the Northern District of Ohio, and was operated by the receiver as a part of the system until the 20th of October, 1883, when by order of the court in Ohio the order for the appointment of the receiver was in respect to the lines in Ohio set aside, and, upon bills filed by the trustees of the mortgages upon the several lines in that state, new orders were made appointing a receiver for each of those lines separately, but naming the same person as receiver in all of the cases. In order that there might be a continued unity of management and operation, the courts of the seventh circuit appointed the same person receiver of the lines in that circuit in lieu of the receiver first appointed: and accordingly the lines in both circuits were operated as a unit until, by the decree of the court in the Southern District of Ohio foreclosing the mortgage on the Iron Railroad, that road was sold to a committee of its bondholders.

302 Early in the proceedings, and while that line was in the possession of the receiver, it was claimed by and in behalf of the bondholders that the earnings of the Iron Railroad exceeded its expenditures, and that the excess, which was being or had been expended in the operation of the system, should be made good by the other lines. On the 5th of April, 1884, Jacob D. Cox was appointed a special master and directed to inquire and state, among other things, "what may be due from the one interest or estate to the other, and what proportion each should bear in respect of any charges and liabilities in the premises." The special master, having made his investigation, filed a preliminary report in the court at Cincinnati, and also (in case No. 7,706) at Indianapolis, where, on the 3rd of October, 1884, it was stipulated that the same should be deemed and taken to be of force in the consolidated suits (Nos. 7,814 and 7,815) there pending, as if filed therein and as if the order of reference to the special master had been made in those suits. That report showed a balance of income of the Iron Railroad over expenses, between November 1st and April 1st, of $33,716.37. A later report was made on the 26th day of July, 1884, showing, among other things, what proportions of the receiver's indebtedness should be borne by the several mortgaged divisions of the system,—"the sum of $33,716.37 before reported to be due the Iron Railroad from the other divisions" being reported as "included in their deficits and a part of the undisputed indebtedness of the receiver, subject however, to be reduced by the proportion of car rentals, etc., charged that road, if the same shall be approved by the court, as reported in the former report of the master."

On the 8th day of February, 1886, the bondholders, who are appellants here, filed in the court at Indianapolis a petition, alleging that $41,133.91 of the earnings of the Iron Railroad had been

diverted by the receivers and applied to the use of the other divisions, including those embraced in the causes pending in the district of Indiana — No. 7,706 and No. 7,814 — and that by the ratio adopted by the special master for apportioning the general expenses of operation, the division embraced in No. 7,706 should bear 30.05 per cent. and the division embraced in No. 7,814 should bear 29.85 per cent. of the whole, making the sum due from one division $12,360.73 and from the other $12,278.46 — for the payment of which sums respectively the petitioners asked decrees. This petition, it is alleged in the application for a rehearing, was never passed upon by the court.

Afterwards, on January 7th, 1887, the special master made a third and final report showing that the net earnings of the Iron Railroad, for the entire time it was in the possession of the re-
303 ceiver, had been $41,748.39; that the whole earnings of the system had been used for operating expenses, and that as matter of law "the excess of earnings over expenses in the case of the Iron Railroad, so used by the receivers for operating the other divisions of the system, ought to be a charge against the fund arising from the sale of such other divisions," etc., and on February 19 ensuing exceptions filed in the court at Cincinnati were there overruled and the report confirmed. That report was filed in the court at Indianapolis, on the 12th of January, 1887. On the first of October, 1886, it was ordered at Cincinnati — the circuit judges of both circuits being present — that the indebtedness of the first receivership of the system and of the various divisions thereof in the several actions brought in both circuits be recognized as debts of the court, the same as the debts of the second receiver, and A. J. Ricks and W. P. Fishback were appointed to take evidence and report the indebtedness. Their report was filed at Cincinnati and Toledo, March 11, 1887, and at Indianapolis the day before — among other things, approving the claim of the Iron Railroad as reported by Special Master Cox, subject to such legal objection as might be made; and it is alleged that no exception to that report was ever taken or filed in any of the courts.

On the 6th of April, 1887, the circuit judges of the two circuits and the District Judge for the Northern District of Ohio, met at the city of Cleveland for the purpose of determining various pending questions, and there agreed upon a decree, since known as the Cleveland decree, which was entered in the various courts having jurisdiction: at Cincinnati, April 12th, and at Indianapolis, April 16th, 1887. By the 8th clause of that decree it is ordered "that the claim of the Iron Railroad for forty-one thousand seven hundred and forty-eight and 39-100 (41,748.39) dollars reported and allowed by Governor Cox, as special master, be and the same is hereby rejected and disallowed; the exceptions now allowed to be filed to the master's report, allowing said claim, are hereby sustained, and it is

finally ordered, adjudged and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale, take nothing by said claim and proceedings thereunder,"— from which decree an appeal to the Supreme Court was prayed and granted upon the giving of a bond in a sum named, "to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division." The appeal was not prosecuted, but on the 28th of April a petition for a rehearing was filed in the court at Cincinnati, and on the first of August ensuing was granted,— the court ordering that the decree be vacated and annulled in respect to the claim of the Iron Railroad, and that the claim stand for rehearing and further order, in the 304 causes pending in the sixth circuit. Upon the rehearing it was adjudged by the court at Cincinnati that the former decree disallowing the claim be annulled and that "said claim of the Iron Railroad for net earnings is hereby re-established in all respects as fully as if the decree of April, 1887, had never been made; provided, however, that this decree does not warrant any enforcement or collection of said claim save in cases No. 3,554, 3,556, 3,577, 3,578 and 3,579," (all pending in Ohio) "without the concurrence herein of the Circuit Court of the United States for the District of Indiana, and the District of Illinois." Counsel representing all divisions of the system were present at that hearing, and in view of a previous order made by Judge Baxter, surrendering primary jurisdiction over the Toledo Division to the Circuit Courts of the Seventh Circuit, the decree, re-establishing the claim, was not entered at Toledo.

The petition for a rehearing was not filed or presented at Indianapolis until November 8th, 1889, where, after reciting the appearance of the parties by counsel, argument and submission, it was ordered "that the petition be allowed, and, by agreement of counsel in open court, it is further ordered that the petition be and the same is hereby set down for further hearing before this court on the 13th day of January, A.D. 1890." On the 27th of February ensuing, upon a showing by affidavit that there had been net earnings by the Toledo Division which should be taken into the accounting between divisions, W. P. Fishback, master, was directed to investigate and report the facts; and on the 13th of February, 1891, he reported that the evidence failed to show earnings above expenses by the Toledo Division. Nothing further seems to have been done until February 29th, 1892, when the amended petition for a rehearing was filed setting forth the facts stated, with details and circumstances which it is not thought necessary or profitable to recite here. To this petition there was opposed a motion to strike out, and also a demurrer, which last the court, on the 28th day of January, 1893, sustained, and ordered and decreed that the petition and amended petition for rehearing be dismissed; and from that decree or order this appeal is prosecuted.

The prayer of the amended petition is divided into seven clauses,

all directly or indirectly to the effect that in the seventh, as had already been done in the sixth circuit, there should be granted a rehearing of the Cleveland decree touching the claim of the Iron Railroad, and that the claim be re-established and apportioned over the several divisions of the system for payment out of the proceeds of sale — the fifth clause being:

305 "That so much of said Cleveland decree as purports to disallow said Iron Railroad claim may be vacated, annulled and held for naught, and as no bar to the enforcement of a just proportion of said Iron Railroad claim against said St. Louis and Toledo divisions, including said Toledo terminals, so far as the causes in the District of Indiana are concerned."

The terms of the Circuit Court of the United States, held at Indianapolis during the time of these transactions, commenced on the first Tuesday in May and in November of each year.

WOODS, *C. J.*, (after stating the facts):

It is well settled that there can be no appeal from an order granting or refusing an application for a rehearing. Steiner *vs.* Franklin County, 14 Wall., 15; Railway Co. *vs.* Heck, 103 U.S., 120; Kennon *vs.* Gilmer, 131 U.S., 22; Roemer *vs.* Burnheim, 132 U.S., 103; Boesch *vs.* Graff, 133 U.S., 697; Trust Co. *vs.* Grant Locomotive Works, 135 U.S., 207.

The appellants contend, however, that the decree of which a rehearing was asked was neither final nor valid; that their petition for rehearing was such only in form; that "in substance and reality it was purely and simply a petition to vacate the alleged decree of April 16, 1887, on the ground that it was absolutely null and void, and was not a decree touching matters pending in the seventh circuit at all."

This position is not tenable. Both by its averments and by its prayer it is clear that the petition was intended to be and is just what it purports to be, a petition for a rehearing. It was not filed in time under equity rule 88, it is true, but equally for any other purpose than a rehearing it has no standing or support. If, as contended, the decree was not final, there is for that reason no appeal from it, and if it was not valid or was absolutely null and void, or did not touch matters pending in the seventh circuit, then it is no obstacle to any procedure pending or that might be instituted for the establishment and enforcement of the claim of the appellants, and the appeal is unnecessary. The grounds on which a rehearing was asked involve the correctness and regularity but not the validity of the decree. If, for instance, no exception had been filed to the several master's reports in support of the claim of the Iron Railroad, and for that reason there should have been a decree in accordance with the findings and recommendations of the special master, the objection is not jurisdictional, and the decree at most could only be said to be erroneous. For the correction of the error there was a

choice of procedure by appeal or by petition for a rehearing.
306 But the appeal, if one is taken, must be always from the original decree, and not from the ruling on a petition for rehearing,—if a rehearing has been asked.

The Cleveland decree, so-called, as entered on the 16th of April, 1887, in the court for the District of Indiana, it is clear, was not invalid; and it was effective to dispose of the claim of the appellants, whether considered as having been brought within the jurisdiction of the court by the reports of the special masters or by the bondholders' petition of February 8, 1886. The general claim, as embodied in those reports, and the claim as more particularly stated and presented by the petition for apportionment among the divisions of the road, which extended into the seventh circuit, were properly before the court for adjudication, and, whatever error there may have been in the decision, the validity of the decree is beyond attack. Though presented in two forms — by the masters' reports and by the petition of bondholders — the claim was essentially one, and was pending when the decree agreed upon by the judges at Cleveland was entered, rejecting the claim as an entirety; and to the extent of the jurisdiction of the court in Indiana over the subject and the parties, that decree when entered there was a final disposition of the claim in both forms. The decree had its force, not from anything done or agreed upon at Cleveland or elsewhere in the sixth circuit, but from the power and jurisdiction of the court which pronounced it; and the subsequent granting of a rehearing by the court at Cincinnati could have no effect upon the decree in Indiana, even if the proviso to the contrary had been omitted from the Cincinnati decree.

The petition for a rehearing, to be available, should have been presented at the term when the decree was entered; and if, so presented, it had been denied, the appeal should have been from the original decree.

This appeal should be dismissed at the cost of the appellants, and it is

So ordered.

307 TUESDAY, May 1, 1894.

Court met pursurnt to adjournment.

Present: Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge.

106. Bondholders and Purchasers of the Iron Railroad
vs.
Toledo, Delphos and Burlington Railroad and the Toledo, Cincinnati and St. Louis Railroad Company.

It is ordered by the court that the petition for rehearing in above entitled cause be, and the same is, hereby overruled.

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308 Then afterwards, to-wit: on the 14th day August in the year aforesaid, came the appellants by their counsel, John C. Coombs and Charles H. Hanson, and presented their petition for an appeal to the Supreme Court of the United States.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

106. Bondholders and Purchasers of the Iron Railroad, Appellants,
vs.
The Toledo, Delphos and Burlington Railroad Company, and The Toledo, Cincinnati and St. Louis Railroad Company, Appellee.

309 PETITION FOR APPEAL.

To the Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

The bondholders and purchasers of the Iron Railroad, petitioners and appellants in the above entitled cause, conceiving themselves aggrieved by the order or decree entered therein on January 20th A.D. 1894, do hereby appeal from the said order and decree to the Supreme Court of the United States, and they pray that this, their appeal, may be allowed, and that a transcript of the record, proceedings and papers on which said order and decree was made,

310 duly authenticated, may be sent to the said Supreme Court of the United States.

JOHN C. COOMBS and
CHARLES H. HANSON,
Attorneys for the Petitioners and Appellants, the Bondholders and Purchasers of the Iron Railroad.

And now, to-wit: on the 14th day of August, 1894, it is ordered that the appeal be allowed as prayed for W. A. WOODS.

TUESDAY, August 14, 1894.

Before Hon. William A. Woods, Circuit Judge.

106. Bondholders and Purchasers of the Iron Railroad
vs.
Toledo, Delphos and Burlington Railroad Company, *et al.*

311 Now this day came the petitioners and appellants by their counsel and prayed that, upon filing their bond, with good and sufficient security, approved by the Court, in the sum of one thousand ($1000.00) dollars, their appeal to the Supreme Court of the United States be granted; and the Court now being sufficiently advised, it is ordered by the Court that this appeal be and the same is hereby allowed, leaving the Supreme Court to determine whether the appeal is authorized by law.

312 IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

106. The Bondholders and Purchasers of the Iron Railroad, Appellants,
vs.
The Toledo, Delphos and Burlington Railroad Co. *et al.* Respondents.

Appeal from the U. S. Circuit Court for the District of Indiana.

Know all men by these presents, That we, Charles R. Batt, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, as principal, and Arthur A. McKain, of Indianapolis, in the County of Marion and State of Indiana, as surety, are held and firmly bound unto Sylvester H. Kneeland in the full and just sum of one thousand dollars to be paid to the said Sylvester H.
313 Kneeland, his executors, administrators or assigns, for the pay-

ment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of August, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas in the above entitled causes a decree was lately entered against the said Charles R. Batt and others, petitioners and appellants, the bondholders and purchasers of the Iron Railroad and the said petitioners and appellants have obtained an appeal to re-
314 move said cause to the Supreme Court of the United States, to reverse the decree in the aforesaid causes, and a citation directed to the said Sylvester H. Kneeland, citing and admonishing him and other bondholders and purchasers of the Toledo, Delphos and Burlington Railroad, and of the Toledo, Cincinnati and St. Louis Railroad, respondents, to be and appear in the said Supreme Court of the United States, in the City of Washington, D.C., on the day of September, A.D. 1894:

Now the condition of the above obligation is such, that if the said Charles R. Batt and others, appellants, shall prosecute their
315 appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation is to be void, otherwise the same shall be and remain in full force and virtue.

CHARLES R. BATT, [SEAL]
ARTHUR A. MCKAIN. [SEAL]

COMMONWEALTH OF MASSACHUSETTS, } ss.
COUNTY OF SUFFOLK. }

BOSTON, August 7, 1894.

Then personally appeared the above named Charles R. Batt, and acknowledged that he had executed the foregoing bond. Before me,

CHAS. F. THAYER,
[SEAL] *Notary Public.*

Approved August 14, 1894.

W. A. WOODS.

Endorsed, filed August 14, 1894.

OLIVER T. MORTON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages numbered from one to three hundred fifteenth inclusive, contain a true copy of the transcript of the record in the case of *The Bondholders and Purchasers of the Iron Railroad* vs. *The Toledo, Delphos and Burlington R. R. Co., et al.*, No. 106, October Term, 1893, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 14th day of August, A.D. 1894.

[SEAL]

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

166-721
166-721

Supreme Court of the United States.

OCTOBER TERM, 1896.

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THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD,

APPELLANTS,

v.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD CO., AND THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD CO.,

APPELLEES.

PETITION OF THE APPELLANTS

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN C. COOMBS,
CHARLES H. HANSON,
Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD, APPELLANTS,

v.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD CO., AND THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD CO., APPELLEES.

THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD, PETITIONERS.

PETITION FOR WRIT OF CERTIORARI

Requiring the United States Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court of the United States, for its review and determination, the case entitled "No. 106. *The Bondholders and Purchasers of the Iron Railroad, Appellants*, v. *The Toledo, Delphos & Burlington Railroad Company and the Toledo, Cincinnati & St. Louis Railroad Company, Appellees.*"

To the Honorable the Justices of the Supreme Court of the United States:

The petition of the bondholders and purchasers of the Iron Railroad respectfully shows to this Honorable Court, as follows:

First. That the case which your petitioners present is one in which the decision is not only manifestly erroneous but

also in conflict both with a decision of the Circuit Court for the sixth circuit and with decisions of this court.

The petitioners had a single claim for $41,748.39, payable and enforceable, nearly one half thereof in the sixth circuit and a little more than a half in the seventh circuit. The court of the sixth circuit has established the claim and paid its proportion thereof; and the courts for the seventh circuit refuse to do so. And the decision in the latter circuit, and especially that of the Circuit Court of Appeals, is not only in conflict with the decision in the former circuit, but is also in conflict with decisions of this court on substantially all points determined.

The rightfulness of the petitioners' claim on the merits is practically conceded. It was *res adjudicata* in behalf of the petitioners before the error herein complained of occurred. The merits have been established by the most widely known and expert masters in railroad accounting in the country,—Ex-Gov. Cox, of Cincinnati, and William P. Fishback, of Indianapolis; and have been confirmed in eight or ten decrees promulgated and concurred in by District Judge Sage, the late Circuit Judges Baxter and Jackson, the latter of whom was afterwards a member of this court, and also by the late Mr. Justice Matthews, then an associate justice of this court. Had either of the last two been spared, the petitioners would rely with confidence upon his personal knowledge of the merits for the review herein sought.

Even in the seventh circuit the rightfulness of the petitioners' claim is practically conceded, but is opposed on the ground of certain technical objections or questions of practice, raised by the respondents, going to the jurisdiction and power of the court, and by the decision of which in the manner in which the same were decided your petitioners were deprived of a decision of their claim in their favor on the merits.

Second. That the questions presented by the record arose,

in the Circuit Court of the United States for the District of Indiana, on respondents' demurrer to a certain petition of these petitioners, called petition for rehearing as amended. The original petition had been filed November 8, 1889, and allowed by order of court of the same date and set down for hearing before the court. The court sustained the demurrer and dismissed the petition. To the ruling of the court sustaining the demurrer the petitioners duly excepted and that exception is preserved in the record. These petitioners submit that the sustaining of the demurrer on the ground on which it was sustained was erroneous and should be reversed. The ground of the decision will appear later.

Third. That the Iron Railroad and its claim for the $41,748.39, net earnings while in the hands of its receiver, were within the exclusive jurisdiction of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

The Toledo, Cincinnati & St. Louis Railroad Company was a consolidated company, composed of seven constituent companies, each of which had, prior to consolidation, made a mortgage upon all its property and was known as a mortgage division of the consolidated company; and these several mortgages were of course unaffected by the subsequent consolidation.

The consolidated road ran from both Ironton and Cincinnati on the Ohio River to a junction at Dayton, thence north by way of Delphos to Toledo, all in Ohio, and west from Delphos through Kokomo, Indiana, to East St. Louis, Illinois. It was thus an intercircuit as well as an interstate road, and was over eight hundred miles long.

The Iron Railroad running from Ironton north was one mortgage division, and was one of the oldest roads in the State — a standard gauge short line road, consisting of three spurs, and doing a large local business between the Ohio River and adjacent mines, and making money. All the

other mortgage divisions were new and an experiment,—over eight hundred miles of narrow gauge railroad to compete in the heart of the country with all the standard gauge roads for through business. The experiment collapsed in utter failure. The Iron Railroad was at one end of the narrow gauge system, and, after the stockholders of the two had consolidated, the narrow gauge system ran over the location of the Iron Railroad on a third rail laid for that purpose, but the equipment could not be interchanged, and the roads and their different kinds of business remained as distinct as if they had been located in different parts of the country.

The consolidated company first went into the hands of receivers August 1, 1883, under judgment creditors' bills filed in the Circuit Court of the United States for the District of Illinois, the District of Indiana and the Northern District of Ohio. No judgment creditors' bill was filed in the Southern District of Ohio. And each of these orders appointing the judgment creditors' receivers contained this express provision: "This order is to apply only to so much of said premises as are within this disiriet; the remainder of the said railroad being subject to the control and direction of the proper courts, within whose jurisdiction the said premises lie, should said courts see fit to take action therein."

September 29, 1883, the judgment creditors' receiver in the Northern District of Ohio was ordered to be discharged on the 20th of the following month, and to reconvey on that date all the property within the State of Ohio to the defendant company, it being understood that separate suits would be commenced on that date to foreclose the mortgages on the several mortgage divisions. And such suits were commenced; and in the sixth circuit a separate receiver was appointed in each foreclosure case, including that to foreclose the mortgage on the Iron Railroad, which lay wholly in the Southern District of Ohio within the jurisdiction of the Cir-

cuit Court of the United States for the Southern District of Ohio, Western Division. Although the same man was in fact appointed and authorized to operate the road of that division in connection with that of any other of which he might be appointed a receiver, he was, nevertheless, in each case required to keep a separate account, to file a separate inventory, and to give a separate bond conditioned to account in that case and court for any property of that division which should come into his hands.

The appellants are bondholders and purchasers of the Iron Railroad Division, and, as such, have the claim of that division against its receiver in cause No. 3,579 in the Circuit Court of the United States for the Southern District of Ohio, Western Division, for $41,748.39, net earnings of said Iron Railroad Division while in the hands of the receiver, which were allowed by him under orders of the court to be diverted and expended by the receivers of the other divisions of the Toledo, Cincinnati & St. Louis Railroad.

Fourth. That this claim of the Iron Railroad for $41,-748.39, net earnings, was established by the decree of February 19, 1887, of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

The proceedings which led up to said decree of February 19, 1887, establishing the said claim, are more particularly as follows:

In the orders appointing the judgment creditors' receiver as aforesaid, power and authority was reserved to any party in interest in any of the constituent companies to apply to the court for direction to the receiver to keep separate accounts so as to preserve any special equities which the court might find to exist in favor of any constituent company. (See article Fourth, Record, p. 7, and Exhibit B, *id.* p. 48.) And the bondholders of the Iron Railroad made such application by a petition setting forth that there was a default in the payment of interest on the mortgage bonds of the Iron

Railroad Division, and that they were therefore entitled to receive any income of that division and have the same applied in payment of said interest. (See Exhibit C, Record, p. 49.) And thereupon an order was entered requiring the accounts of the earnings and expenses of the Iron Railroad to be kept separate. (See Record, p. 51.)

Five of the mortgage divisions were wholly within the State of Ohio and sixth circuit; of the other two one ran from Toledo, Ohio, to Kokomo, Indiana, and was called the Toledo Division; the other ran from Kokomo, Indiana, to East St. Louis, Illinois, and was called the St. Louis Division.

April 5, 1884, an order of reference was entered in the Iron Railroad foreclosure case, at the suggestion and with the consent of the parties, appointing Hon. J. D. Cox special master. And like orders of reference were entered in all the other causes pending in the sixth and seventh circuits, except in the St. Louis Division foreclosure case in the District of Indiana, being No. 7,814. These orders of reference further ordered "that all persons that have heretofore filed applications in any of said several causes for relief may appear before the master and be heard in their own behalf"; "that the parties respectively have leave to amend their pleadings as they may be advised, in order to properly present for determination any and all questions that may properly arise upon the master's report, and for the like purpose they may bring in new parties, if they shall be so advised, and make such new parties parties to this reference"; "that the master shall be and he hereby is authorized to examine as to any matters not specifically embraced herein and necessary to the final adjustment of the rights of the claimants or parties in any of the said respective causes, and report the same to the court"; "that the master proceed in the premises with all convenient speed, and report the evidence, together with his proceedings and opinion thereon."

(See article nineteenth, Record, p. 15; and Exhibit E 2, *id.* p. 60.) These orders of reference were in terms identical, but required him to treat the several mortgages under which he was appointed as embracing and representing distinct and independent interests, and directed him to "inquire and state what, if anything, may be due from one interest to the other, and what proportion each should bear in respect of any charges or liabilities in the premises." (See sect. 8 of Exhibit E 2, Record, p. 63.)

The special master made three reports (Exhibit F 2, K 2, and Q 2, Record pp. 66, 98 and 103): (1) a preliminary report which was filed in Cincinnati June 26, and in Indianapolis July 17, 1884; (2) a second preliminary report, which was filed in Cincinnati July 26, 1884, and in Toledo January 18, 1887; (3) a final report which was filed in Cincinnati January 7, in Indianapolis January 12, and in Toledo January 18, 1887. In Indiana the preliminary report was filed in cause No. 7,706 (the Toledo Division foreclosure case), and was adopted by stipulation of the parties in cause No. 7,814 (the St. Louis Division foreclosure case), the same as if the order of reference had been entered in that cause; but the final report, which reported the claim for the $41,748.39, was only filed, in Indianapolis, in cause No. 7,706. (See Record, pp. 64, 97.)

The first and second preliminary reports found and reported the claim down to April 1, 1884, for $33,716.37, and as undisputed indebtedness; the final report found and reported the claim down to August 1, 1884, as a claim for $41,748.39 of the Iron Railroad against its receiver, and as undisputed indebtedness, and also found, in pursuance of the reference, what proportion each division should bear in respect of such indebtedness.

To the final report exceptions were seasonably filed by purchasers of only three of the divisions, namely, the Cincinnati, the Dayton, and the Dayton & Southeastern Divisions.

The appellees filed no exceptions within the time allowed by Rule 83. And the exceptions filed by the Cincinnati, the Dayton, and the Dayton & Southeastern Divisions were overruled, and the report confirmed, and the claim established by the decree of Judge Sage, entered in the Circuit Court of the United States for the Southern District of Ohio, Western Division, February 19, 1887, at a term which ended on the fifth of the following April. The purchasers of those three divisions accepted the result as final, and settled accordingly.

Fifth. That, nevertheless, at the next term, to-wit, April 6, 1887, Circuit Judges Gresham and Jackson, and District Judge Welker of the Northern District of Ohio, met at Cleveland, Ohio, to agree upon and take joint action touching many matters of local or general interest involved in the foreclosure of these several divisions, all as the omnibus decree, there formulated, shows. Counsel for these petitioners was notified barely in time to be present. None of the cases were pending in Cleveland, and there was no scrap of any of the records to be had there. The judges called up the claim of the Iron Railroad as if it were a new matter. These petitioners protested, but the judges persisted and threw out the claim of the Iron Railroad entirely, notwithstanding the confirmation of the report and the establishment of the claim by the said decree of February 19, 1887, and the expiration of the term at which said decree was entered, as aforesaid, without petition for rehearing or appeal; and in pursuance thereof they discharged the Iron Railroad's receiver, which relieved him from all accountability under his bond in respect of the claim.

That action rendered all consideration of contribution by any division irrelevant and unnecessary. The judges dealt with the claim only as an entirety, as the claim of the Iron Railroad, and as pending in the Iron Railroad case in Cincinnati. The petitioners immediately asked for an appeal to

this Court, both from the disallowance of the claim and the discharge of the receiver who should account for it; and the judges granted the appeals, expressly directing that they be perfected and taken at Cincinnati, as indeed they must have been if taken at all, and no appeal in any other court was asked, sought or given, notwithstanding that, because of the great variety of matters considered in the Cleveland decree between different parties and of local or general concern in various causes, the judges ordered the omnibus decree to be filed in all the foreclosure cases pending in the Sixth and Seventh Circuits.

Sixth. That the petitioners gave the bond as required to the approval of the Circuit Court for the Southern District of Ohio, but on examination of the record of the Circuit Court for the Southern District of Ohio, it being apparent that the Cleveland decree was not only erroneous but null and void, the petitioners immediately filed a petition for rehearing of the Cleveland decree. The hearing was had at Cincinnati June 6, 1887, before Mr. Justice Matthews and Judge Jackson. Judge Gresham, who had been requested by the petitioners to be present, answered in a letter dated June 2, 1887, that it would be impossible for him to be in Cincinnati on the 6th inst., as he was sitting with Mr. Justice Harlan in hearing equity causes, but added: "If Mr. Justice Matthews and Judge Jackson grant a rehearing on your application and enter such a decree as you desire, I presume I will conform to their action in this circuit. You are at liberty to show them this letter if you like, that they may understand why I do not appear as requested." The respondents, the appellees herein, appeared and alone of the parties in interest argued against the rehearing, and the matter was fully heard and determined in that court which alone had jurisdiction and where it was pending in Cincinnati; and the decree was adjudged to have been inadvertently made, and its disallowance of the claim of the Iron Railroad

was annulled and set at naught, for the reason that the claim, besides its justice, was *res adjudicata* when the judges at Cleveland had attempted to act upon it. Mr. Justice Matthews announced his decision in a letter to Judge Jackson as early as June 13, 1887. He said:

"On consideration I submit to you the following suggestions upon the question as to the allowance to be made to the Iron R.R. Co. on account of the net earnings arising from the operation of its road having been applied by the receiver under the orders of the court to the expense of operating other parts of the consolidated line.

"I assume that the theory upon which the administration was had in the circuit was that of separate receiverships for each division, and that it is too late now to question its correctness in point of law.

"The receiver of the Iron Railroad is bound to account in that case for all its earnings, including the amount in question. He shows that under the order of the court he permitted it to be used by the receivers of the other divisions of the road; the court is therefore bound to see that these receivers in proper proportions refund it. It would seem, therefore, that such decrees should be entered in all the cases in this circuit, and that the Cleveland decree, therefore, so far as it conflicted with this result, should be set aside either on the ground that the matter had been previously adjudged or that it was erroneous in those cases in which Judge Sage's decree was not conclusive.

"As to the cases in Indiana and Illinois, it must be left to Judge Gresham to decide upon what rule he will act.

"If he declines to make the allowance against the divisions within those States, the divisions in this circuit should only be charged with their proportions of the whole."

The claim was fully re-established by decree of November 12, 1888; and all the Ohio divisions, except so much of the Toledo Division as is in Ohio, have paid their pro rata part of the contribution thereto.

Seventh. That the appellants, as bondholders and purchasers of the Iron Railroad, and standing on their rights and on

the rights of the Iron Railroad and of the receiver against the several divisions of said Toledo, Cincinnati & St. Louis Railroad, sought, in the courts for the seventh circuit to enforce against the Toledo Division and the St. Louis Division the portion of said claim which should properly pertain to them respectively. The Toledo Division ran from Toledo, Ohio, to Kokomo, Indiana; and the St. Louis Division ran from Kokomo to East St. Louis, Illinois. These two made up a little more than half the entire system. The other five divisions were wholly within the State of Ohio.

For the purpose of enforcing such liability of said Toledo and St. Louis Divisions, the appellants filed, February 8, 1886, in causes No. 7,706 (the Toledo Division foreclosure case) and No. 7,814 (the St. Louis Division foreclosure case) their "Petition and Claim No. 69*a*." As set out in that petition and claim, there was due from the Toledo Division, in cause No. 7,706, $12,360.73, and from the St. Louis Division, in cause No. 7,814, the sum of $12,278.46. That petition and claim was never dismissed or passed on in either of these causes. (Record, pp. 132, 27-8.) These petitioners submit that any entry which did not pass on and dispose of that petition and claim could not technically be a final decree in the cause as against that precise claim and as between these petitioners and the Toledo Division in one cause or the St. Louis Division in the other cause, however apparently decisive of the claim as a whole and as between other parties.

Although the Cleveland decree was ordered to be filed in all the causes, an appeal from so much of it as purported to disallow the claim of the Iron Railroad for the $41,748.39 was allowed as an appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division. And the petitioners relied upon the appeal thus given as sufficient, and never sought or asked for an appeal therefrom in any other court or cause; because that much of the decree,

if valid at all, was a decree on issues and between parties in the Circuit Court of the United States for the Southern District of Ohio, Western Division. For the same reason, on presenting a petition for rehearing, they filed the petition for rehearing in the court from which the appeal had been allowed and no other. But they had requested and expected that Judge Gresham would be present at the hearing on the petition for rehearing as he was at the Cleveland hearing. When they arrived at Cincinnati and received his letter announcing that he could not be present on the 6th as requested, the same terms were still in continuance at Toledo and Springfield, and the petition, for abundant caution, was filed at both of those places. That laid a foundation, if any were necessary, for review of the matter as it should affect both the Toledo Division and the St. Louis Division; for it covered the east half of one and the west half of the other. The term at Indianapolis had closed; in fact it had closed before Judge Gresham's letter was written, and no attempt was then made to file a copy of the petition there. But although the term had closed at Indianapolis, as a matter of fact the exceptions to Cox's report which the Cleveland decree purported to allow to be filed and on which it purports to stand, had not been filed, either at Cincinnati where the decree was entered April 12, 1887, or at Indianapolis where the decree was entered April 16, 1887, or at Toledo where the decree was entered June 6, 1887. These petitioners submit that so much of the Cleveland decree as purported to disallow the claim of the Iron Railroad for the $41,748.39, was for this reason also null and void wherever entered. It is true the decree did not expressly say *where* the exceptions were to be filed, but it did not have to do so. They could only be filed in the court and case where the claim as passed upon was pending, in which the receiver was discharged, where the appeal was to be perfected and the records made up, and to which court the mandate from this court would

return: that is, in the foreclosure case of the Iron Railroad at Cincinnati.

After the argument at Cincinnati, at which it was clear that the rehearing must be granted, and after the expiration of the term at Indianapolis as aforesaid, to wit, on June 28, 1887, the court for the District of Indiana purported to allow the respondents to file exceptions *nunc pro tunc*; but this, if of any consequence, was without petition therefor and without notice to your petitioners and after the argument at Cincinnati of the petition for rehearing for the vacation of the Cleveland decree and the enforcement of the claim, and after the assurance of Judge Gresham to these petitioners that he would probably conform to the action of Mr. Justice Matthews and Judge Jackson.

These exceptions have been lost; that is, they cannot be found nor their contents learned. What the respondents could have filed there would seem to pass comprehension. They might as well have filed them in their pocket. No appeal was to be taken or made up from that court; the claim as passed on was not pending there; nor were there parties, pleadings or issues before that court for so much of the decree as was appealed from to act upon. In the case of the St. Louis Division foreclosure case, Cox's report, to which the exceptions were allowed, has never been filed; nor was the reference in pursuance of which that report was made ever entered in that cause. The exceptions would be as unmeaning in that case as is the portion of the decree appealed from, or the appeal itself.

November 18, 1888, the petitioners presented the said decree of November 12, 1888, annulling the Cleveland decree and re-establishing the claim, to Judge Jackson for his sanction to the entry thereof in said Circuit Court at Toledo. Counsel for respondents opposed such entry, and submitted an order of the late Judge Baxter, dated December 20, 1883, purporting to surrender primary jurisdiction over the Toledo Divi-

sion case to the Circuit Court for the District of Indiana. And thereupon Judge Jackson refused to direct the entry of the decree until the court for the District of Indiana should concur.

November 8, 1889, the parties met at Indianapolis for hearing. No petition for rehearing or vacating the Cleveland decree against the claim of the Iron Railroad had been filed; but that decree had been already vacated in the only court having jurisdiction of the claim as passed on. As a foundation for a hearing to vacate or avoid it in the seventh circuit, the petitioners asked the court to hear them on the two petitions which had been timely filed in Toledo and Springfield for rehearing of the decree before it was vacated, and which were copies of the petition filed for the same purpose and granted in Cincinnati; or they offered then to file another copy of the same petition which they had with them there at Indianapolis. This last suggestion was acted upon. The petition was in form, of course, a petition for rehearing, for it was a copy of the Cincinnati petition which had properly been so denominated, and it did not set up the fact, which had since occurred, that the Cleveland decree against the claim of the Iron Railroad had been vacated in the Cincinnati Court. But this fact was in the mind of the court and parties, for when the respondents began to speak in opposition to the petition, Judge Gresham stopped them with the remark, in substance, that in view of the action taken in the sixth circuit by Judges Matthews and Jackson, he could not refuse a rehearing, which he granted by an order of record. The entry recited the appearance of the respondents, the granting of the petition and the agreement of the parties in open court that the petition be set down for hearing at a given date. (Record, p. 178.)

At the next hearing the respondents filed affidavits purporting to show, on the merits, that the Toledo Division ought not to contribute to the payment of the claim, and

asked a reference to a master to prove the allegations of the affidavits. The reference was made, and all the allegations refuted and the claim sustained by the master.

Then the case came on for hearing on the master's report, when the respondents suggested orally that the Indianapolis petition was for a rehearing and had been filed too late under Equity Rule 88. The petitioners thereupon asked leave to amend their petition and bring forward the record which showed that the Cleveland decree had been vacated on rehearing instead of appeal on a hearing of the parties in Cincinnati, the court having jurisdiction of it as passed.

The court allowed the amendment, but also allowed the respondents to demur to the petition as not brought in time under Rule 88, and sustained the demurrer and consequently dismissed the petition by the decree of January 28, 1893. In the decree the court allowed the petitioners an exception to the order sustaining the demurrer as well as to that dismissing the petition, and an appeal to the Circuit Court of Appeals for the Seventh Circuit.

For Assignment of Errors on that appeal see Record, pp. 224-6.

The Circuit Court of Appeals held —

That the appeal was from an order refusing an application for rehearing; that no appeal lay from such an order; that the appeal, if one is taken, must be always from the original decree and not from the ruling on a petition for rehearing, if a rehearing has been asked.

That the petition for rehearing had no standing as a petition to vacate the alleged decree as null and void; that the Cleveland decree, so called, as entered April 16, 1887, in causes No. 7,706 and No. 7,814 in the Circuit Court of the United States for the District of Indiana, was valid and beyond attack; and that the said decree, agreed upon by the judges at Cleveland, rejecting the claim as an entirety, was, when entered in Indiana, a final disposition of the claim whether as presented by the master's report, or by the bondholders' petition of February 8, 1886.

And the Court of Appeals ordered that the appeal be dismissed at the costs of the appellants.

From that decree the petitioners claimed an appeal to this court, and thought, under the Court of Appeals Act, such an appeal lay as of right. The appeal was allowed. The appellants duly gave a supersedeas bond, and perfected the appeal by docketing the case and filing a transcript of the record in this court. And the said appeal is still pending and is case No. 167 on the docket of this court. But there is nevertheless a question, in view of the construction which this court has put upon the Court of Appeals Act, as to the power and authority of the court on said appeal to review and determine the questions raised on the record in said causes. Wherefore, to avoid any question as to the power and authority of the court to review and determine the said causes and to properly bring the said causes before this court for its review and determination, these petitioners, believing the said causes to be proper cases for review by this court, respectfully pray this honorable court to issue a writ of certiorari to the United States Circuit Court of Appeals for the seventh circuit to have the said causes properly certified to this court for its review and determination.

GROUNDS FOR ASKING WRIT OF CERTIORARI.

The petitioners ask for a writ of certiorari to the United States Circuit Court of Appeals for the seventh circuit on substantially the following grounds:

(1) For that the said Court of Appeals erroneously held the proceedings from which the appeal was taken as "an application for a rehearing," and the appeal as an appeal from a refusal to grant a rehearing — a matter of discretion from which no appeal lay. Whereas the Circuit Court had already granted a rehearing, and, so far as there was any exercise of discretion, had exercised it in favor of the petitioners by the

order of November 8, 1889, the court saying at the argument for rehearing that, in view of the action of Mr. Justice Matthews and Judge Jackson in the sixth circuit, he could not refuse to grant a rehearing; and in the subsequent proceedings on the propositions presented by the petition the court did not decide the various questions raised in the exercise of a mere discretion, but as matter of law and on demurrer to the petition, allowing the petitioners an exception to his ruling sustaining the demurrer as well as to the order dismissing the petition, and an appeal from both.

Also for that the decision of said Court of Appeals that the appeal must always be taken from the original decree and not from the decree on the propositions presented by the petition, notwithstanding the granting of the rehearing and the decision of the matters presented by the petition, as matters of law and not in the exercise of mere discretion, is in conflict with the decision of this Court in *Moelle* v. *Sherwood*, 148 U.S. 21, 26.

Also for that the decision of said Court of Appeals, that no appeal lay from a decree on propositions presented by the petition notwithstanding the granting of a rehearing and of the further fact that the decree disposed of the petition, not as a matter of discretion, but as a matter of law on propositions presented by the pleadings, is in conflict with numerous decisions of this Court on this and analogous questions, in *Moelle* v. *Sherwood*, *ubi supra*; *Am. Constr. Co.* v. *J. T. & K. W. R. Co.*, 148 U.S. 387; *Harris* v. *Barber*, 129 U.S. 366, 369; *Mattox* v. *United States*, 146 U.S. 140, 147; *Logan* v. *United States*, 144 U.S. 263, 282-3; *United States* v. *Thomas*, 151 U.S. 577, 581. See also *Pittsfield Natl. Bank* v. *Bayne*, 140 N.Y. 321, 328; *People* v. *Brooklyn Fire Ins. Commis.*, 103 N.Y. 370 and cases; *Steamboat New England*, 18 Fed. Cas. pp. 53, 56-7; *United States* v. *Wilson*, 7 Pet. 160; *United States* v. *Chicago*, 7 How. 190; *United States* v. *Reid*, 12 How. 361.

(2) For that the said Court of Appeals erroneously held that the said Cleveland decree, so called, so far as it related to the Iron Railroad claim and purporting to deny the claim as an entirety for the $41,748.39, was, as entered April 16, 1887, in the district of Indiana in causes No. 7,706 and No. 7,814 (the causes from which the appeal to the Court of Appeals was taken), a *final* decree. Whereas petitioners' "Petition and Claim No. 69*a*," whereby the petitioners' claim against the Toledo Division in cause No. 7,706 was set forth specifically as $12,360.73, and their claim against the St. Louis Division in cause No. 7814 was set forth specifically as $12,278.46, were not passed on by the court or disposed of; and in cause No. 7814 at least, this petition and claim No. 69*a* was not only the only pleading but the only form by which the claim, as a whole or as a proportional part against the St. Louis Division, was ever presented, the reference to Hon. J. D. Cox as special master and his third and final report which found and reported the claim as a whole for the $41,748.39 never having been entered or filed in that cause.

Also for that the decision of said Court of Appeals that a decree is final which does not dispose of all the matters within the pleadings, however decisive on the merits, is in conflict with numerous decisions of this Court, in *Craighead* v. *Wilson*, 18 How. 199, 201; *McGourkey* v. *Toledo, etc., Ry.*, 146 U.S. 544, 546, 548-51; *Lutta* v. *Kilbourn*, 150 U.S. 524, 539; *Keystone Manganese Co.* v. *Martin*, 132 U.S. 91, 93 and cases; *Natl. Bank* v. *Smith*, 156 U.S. 330, 334; *Winters* v. *Ethell*, 132 U.S. 207, 209-10; *Lodge* v. *Twell*, 135 U.S. 232, 235, 236; *Meagher* v. *Minn. Thresher Mfg. Co.*, 145 U.S. 608; *Luxton* v. *Bridge Co.*, 147 U.S. 337, 341; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U.S. 374, 378; *Gt. Western Tel. Co.* v. *Burnham*, 162 U.S. 339, 342-3, 346.

(3) For that the said Court of Appeals erroneously held that the said Cleveland decree, so called, so far as it related

to the Iron Railroad claim, as entered April 16, 1887, in the district of Indiana in causes No. 7,706 and No. 7,814 (the causes from which the appeal to the Court of Appeals was taken), was a *valid* decree. Whereas the said decree purported to disallow the claim of the Iron Railroad as an entirety for the $41,748.39,— a matter never submitted to the jurisdiction of the Circuit Court for the District of Indiana,— and was outside of and unsupported by the pleadings in the cause, and absolutely null and void. In one of these causes at least, to wit, that numbered 7,814 in the Circuit Court, the decree expressly purports to stand on the third and final report of Special Master Cox, which reported and allowed the claim of the Iron Railroad for $41,748.39; whereas in truth and in fact that report was never filed or adopted in said cause No. 7,814, nor was the order of reference to Special Master Cox, in pursuance of which the report was made, ever entered in that cause. The decree, therefore, in one of these causes and as between the petitioners and the St. Louis Division and the bondholders and purchasers thereof, was not only outside of and unsupported by the actual pleadings in the cause, but expressly purports to stand on proceedings that were never any part of the proceedings in the cause.

Also for that the decision of said Court of Appeals, on the question of the validity of said Cleveland decree, so called, so far as the same related to the Iron Railroad claim, as entered April 16, 1887, in the district of Indiana in causes No. 7,706 and No. 7,814, is in conflict with the decisions of this Court in *Reynolds* v. *Stockton*, 140 U.S. 254, which holds that a decree outside of and unsupported by the pleadings in the cause is absolutely null and void.

Also for that the decision of said Court of Appeals that the petition for rehearing, so called, was without standing as a petition to vacate the alleged decree as null and void, is in conflict with the decision of this Court in *Central Trust Co.* v. *Grant Locomotive Works*, 135 U.S., 34 L. ed. 100,

103-4, wherein the Circuit Court vacated one of its decrees as null and void on a petition for rehearing filed after the expiration of the term (too late if the decree had been valid), asking a rehearing and that the decree be vacated as null and void, and that action of the Circuit Court was affirmed by this court.

(4) For that the decision of said Court of Appeals on the questions as to the *finality and validity* of the Cleveland decree, as on the merits generally, is in conflict with the action and decision in the same matter of the Circuit Court of the United States for the sixth circuit, on whose orders, proceedings and decrees the petitioners mainly rely for the foundation and existence of the claims which they seek to enforce in these causes, and especially is in conflict with the decisions, opinions and views of the Circuit Court for the Sixth Circuit by the late Mr. Justice Jackson, then circuit judge, and the late Mr. Justice Matthews, then associate justice of the Supreme Court, the Circuit Court for the Sixth Circuit, as these petitioners understand it, having asserted substantially exclusive jurisdiction of the claim as a whole, declared the Cleveland decree, so called, so far as the same related to the Iron Railroad claim and wherever entered, a mere nullity, and re-established the claim as a whole as fully in all respects as if the Cleveland decree had never been made; and it was only on the question of distribution and enforcement that Mr. Justice Matthews and Judge Jackson required the concurrence of the Circuit Courts of the United States for the District of Indiana and the District of Illinois.

Wherefore your petitioners respectfully pray:

That a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court on a day certain to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case

therein entitled "No. 106. The Bondholders and Purchasers of the Iron Railroad, Appellants, *v.* The Toledo, Delphos & Burlington Railroad Company, and The Toledo, Cincinnati & St. Louis Railroad Company, Appellees," to the end that the said case may be reviewed and determined by this court as provided in section 6 of the Act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and to regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3 A.D. 1891, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that said judgment of said Circuit Court of Appeals in said case and every part thereof may be reversed by this honorable court, and thus your petitioners will ever pray.

THE BONDHOLDERS AND PURCHASERS
OF THE IRON RAILROAD,
by JOHN C. COOMBS *and*
CHAS. H. HANSON,
Solicitors for Petitioners.

JOHN C. COOMBS,
CHAS. H. HANSON.
of Counsel for Petitioners.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

John C. Coombs, being duly sworn, says that he is one of the attorneys and of counsel for the bondholders and purchasers of the Iron Railroad, the petitioners above named, and as such was for said petitioners, with other counsel, in personal charge of said case in the foregoing petition mentioned in the Circuit Court of the United States for the District of Indiana, and in the United States Circuit Court of Appeals for the Seventh

Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

JOHN C. COOMBS.

Subscribed and sworn to before me this twenty-seventh day of November A.D. 1896.

WILLIAM H. LEONARD,
Justice of the Peace.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD,

APPELLANTS,

v.

THE TOLEDO, DELPHOS AND BURLINGTON RAILROAD CO., AND THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD CO.,

APPELLEES.

BRIEF OF APPELLANTS

IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN C. COOMBS,
CHARLES H. HANSON,
Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD, APPELLANTS,

v.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD CO., AND THE TOLEDO, CINCINNATI & ST. LOUIS RAILROAD CO., APPELLEES.

BRIEF OF APPELLANTS

IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT FOR PETITIONERS.

This is an application for a writ of certiorari to the United States Circuit Couit of Appeals for the Seventh Circuit. The facts are stated in the petitionas briefly as can be consistently with a clear understanding of the case.

By Sect. 6 of the Court of Appeals Act it is made competent for the Supreme Court to require, by certiorari or otherwise, any case thereinbefore made final in the Circuit Court of Appeals to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

One of the principal objects of this provision was to give the Supreme Court a supervisory jurisdiction and thus se-

cure uniformity of decisions. By the act nine Circuit Courts of Appeals were created, independent of each other and of the Supreme Court, and whose decisions in a large majority of cases were to be final. It was inevitable that there should be conflicting decisions, not only as between the different circuits, but also as between the Courts of Appeals and the Supreme Court. Hence this provision in the act.

That to secure uniformity of decisions was one of the objects of the provision has been repeatedly recognized and affirmed by this Court.

Am. Constr. Co. v. *J. T. & K. W. R. Co.*, 148 U.S. p. 383.
Re Lau Ow Bew, 144 U.S. p. 58.
Re Woods, 143 U.S. p. 206.
Columbus Watch Co. v. *Robbins*, 148 U.S. 266.

It is on the ground of the existence of such a conflict and consequent error that we ask for a writ of certiorari in this case, and it will be the main purpose of this brief to show that the decision of the Circuit Court, and especially of the Circuit Court of Appeals, is in conflict with the decisions of this court and consequently erroneous; that it is in conflict with the decisions of this court on all the material questions passed upon, to-wit:

(1) As to whether the decree from which the appeal to the Circuit Court of Appeals was taken was *appealable*; (2) as to the *finality* of the Cleveland decree, so called, so far as it related to the Iron Railroad claim as entered April 16, 1887, in the District of Indiana in causes No. 7,706 and No. 7,814, — the causes from which the appeal to the Court of Appeals was taken; (3) as to the *validity* of the Cleveland decree, so called, so far as the same related to the Iron Railroad claim as entered April 16, 1887, in the District of Indiana, in said causes No. 7,706 and No. 7,814.

And that on the last two of these questions also, as on the

merits generally, the decision of the Circuit Court and of the Court of Appeals is in conflict with that of the Circuit Court of the United States for the Sixth Circuit by the late Mr. Justice Jackson, then circuit judge, and the late Mr. Justice Matthews, then an associate justice of the Supreme Court, the Circuit Court of the United States for the sixth circuit having declared the Cleveland decree, so called, so far as the same related to the claim of the Iron Railroad and wherever entered, a mere nullity, and asserted substantially exclusive jurisdiction of the claim as a whole, and re-established the claim as a whole as fully in all respects as if the Cleveland decree had never been passed. It was only on the question of distribution and enforcement that that court required the concurrence of the Circuit Court for the seventh circuit.

I.

Brief Review of Circuit Court of Appeals' Opinion.

The petitioners accept as impartial and exact as far as it goes the statement of facts by the Court of Appeals in the statement preceding the opinion. (62 F.R. 167-9.)

The question presented by the opinion is one of practice. The decision rests wholly on a hard and erroneous application of Equity Rule 88 to defeat conceded rights.

On the question of appeal it says:

"It is well settled that there can be no appeal from an order granting or refusing a rehearing. . . .

"The appeal, if one is taken, must be always from the original decree and not from the ruling on a petition for rehearing, if a rehearing has been asked. . . .

"The petition for a rehearing to be available should have been presented at the term when the decree was entered, and if, when so presented, it had been denied, the appeal should have been from the original decree."

That is not the question, nor is it an altogether correct

statement of the law on the question assumed, as we shall show under division II. of this brief.

If a court of competent jurisdiction over the parties and the subject matter passed on makes a decree which is valid and final, the application for a rehearing must be made before the enrollment of the decree, *i.e.*, in the federal courts, by rule, before the end of the term. When the application to rehear is thus timely presented, it appeals to the discretion of the court; and, if so denied, the ruling is not reviewable. That is good, though somewhat elementary, both under the rules prescribed for federal courts and outside of them.

It is not relevant, however, to the procedure for vacating or avoiding the bar of a decree, inadvertently entered in a court that has no jurisdiction, territorially, *in rem* or *in personam*, as was the Cleveland decree concerning the Iron Railroad, its claim and the discharge of its receiver, when entered in Indiana; or a decree that has been vacated as a nullity by the only court of competent jurisdiction, as this one had been when the petition to vacate it in Indiana was filed; or a decree that is not valid, as this one was not when entered in Indiana, because not authorized by any pleadings in the cause; or a decree that is not final, as this one was not when entered in Indiana, for it was not appealable there, and did not purport to touch the only question there pending.

In all these instances, the time and method of procedure to avoid or vacate is practically immaterial.

And to the general rule that the results of a motion for new trial or petition for rehearing cannot be reviewed on writ of error or appeal, there is a well recognized exception within which the facts of this case bring it, as we shall also show under division II. of this brief.

In the case at bar the Circuit Court sustained the demurrer to the petition, and in passing upon the petition did not exercise any discretion in respect of the matters stated therein.

Due exception was taken and the question of the error of the court in sustaining the demurrer is thereby preserved.

Besides, when a petition is demurred to as not timely filed, the question thereby presented is not one of discretion. It is no longer discretionary with the court to either grant or refuse. When Rule 88 is invoked, the question is whether the rule decides the case, and not simply whether the court will follow the rule. The former is a question of law, and the latter is not one of discretion. If the court on such a demurrer dismiss the petition for want of jurisdiction, when it in fact possessed jurisdiction, then it may become the proper duty of the appellate court to reverse that decree of dismissal and to remand the cause for further proceedings.

Under the circumstances of this case, the oft-repeated iteration of the Court of Appeals, that the appeal must be from the original decree and not from the ruling on the petition for rehearing, is idle and a mockery. For at the time of the dismissal of the petition in these causes the Cleveland decree against the claim of the Iron Railroad had been vacated in the only court in which it ever was appealable and was no longer appealable in any case or court. It never was appealable in Indiana. As the Cleveland decree itself shows, we did ask an appeal when the decree was agreed upon by the judges at Cleveland; and if the decree had been final and appealable in Indiana, the appeal would have been allowed there. It was not final and appealable in Indiana and for that reason no appeal was allowed from it there. From the disallowance of the claim of the Iron Railroad, as from the discharge of its receiver, the judges at Cleveland properly allowed the same appeal, on a single bond, from the Circuit Court of the United States for the Southern District of Ohio, Western Division, and from no other court or cause.

The second position taken by the Court of Appeals is this:

"The appellants contend, however, that the decree of

which a rehearing was asked was neither final nor valid; that their petition for rehearing was such only in form; that 'in substance and reality it was purely and simply a petition to vacate the alleged decree of April 16, 1887, on the ground that it was absolutely null and void, and was not a decree touching matters pending in the seventh circuit at all.' This position is not tenable. Both by its averments and by its prayer, it is clear that the petition was intended to be and is just what it purports to be — a petition for a rehearing."

Why the petition as originally filed at Indianapolis was in the form of a petition to rehear is explained by the facts and circumstances under which the petition was filed. (See Petition for Writ of Certiorari, p. 14). As amended, the petition set up that the decree had already been vacated in Cincinnati, and prayed to have it set aside in the seventh circuit. The statement of facts by the Court of Appeals contains a quotation of the prayer, which we quote:

"That so much of said Cleveland decree as purports to disallow said Iron Railroad claim may be vacated, annulled, and held for naught, and as no bar to the enforcement of a just proportion of said Iron Railroad claim against said St. Louis and Toledo Divisions, including said Toledo Terminals, so far as the causes in the district of Indiana are concerned."

Then there follows, in the opinion, an illustration which does not seem to be applicable to any hypothetical contingency of the case. That which is intelligible in it is the assertion that the Cleveland decree was valid and the objection to it was not jurisdictional. These are mistakes: it was invalid and there was no jurisdiction.

The balance of the decision is made up of a confusion of the claim of the Iron Railroad as a whole with the special claim of these petitioners against the Toledo and the St. Louis Divisions as presented by petition and claim No. 69*a*, with consequent errors as to jurisdiction, validity and finality. The court says:

"The 'Cleveland decree,' so called, as entered on the 16th of April, 1887, in the court for the district of Indiana, it is clear, was not invalid; it was effective to dispose of the claim of the appellants, whether considered as having been brought under the jurisdiction of the court by the reports of the special masters or by the bondholders' petition of February 8, 1886. The general claim, as embodied in those reports, and as more particularly stated and presented by the petition for apportionment among the divisions of the road which extended into the seventh circuit, was properly before the court for adjudication; and, whatever error there may have been in the decision, the validity of the decree is beyond attack. Though presented in two forms,— by the masters' reports, and by the petition of bondholders,— the claim was essentially one, and was pending when the decree agreed upon by the judges at Cleveland was entered, rejecting the claim as an entirety, and to the extent of the jurisdiction of the court in Indiana over the subject and the parties, that decree, when entered there, was a final disposition of the claim in both forms. The decree had its force, not from anything done or agreed upon at Cleveland or elsewhere in the sixth circuit, but by virtue of the power and jurisdiction of the court which pronounced it; and the subsequent granting of a rehearing by the court at Cincinnati could have had no effect upon the decree in Indiana, even if the proviso to the contrary had been omitted from the Cincinnati decree."

The answer to this is that it confounds the petition for contributions, which were not mentioned at all, with Cox's allowance of the claim as a whole, which was all that the decree dealt with. The decree did *not* dispose of the claim "in both forms." That was why only one appeal was allowed. The *two* were *not* "essentially one." The claim was forty odd thousand dollars as a whole and as against the receiver of the Iron Railroad, and twelve thousand dollars as a part contribution from each of the seventh circuit divisions. The whole includes every part; but the court that has jurisdiction only of a part cannot assume to pass on the whole. The

whole claim was disallowed, which forbids that petitions for contribution to it could have been considered. It would be just as sensible to say that if the Cleveland decree had been reversed on appeal it would have established the claims under the petition for contribution as a finality, without a right of the contributing divisions to be heard; when, as a matter of fact, the respondents, after they thought the decree had been vacated, had the case referred on the very question whether the Toledo Division should be held to contribute.

Then it is said that the general claim, "as embodied in the reports *and* . . . the petition for apportionment . . . *was* properly before the court for adjudication." What court had *both* of these before it? One was before one court, and one was before another. They did not melt and run together at Cleveland, so that the judge of the seventh circuit took it as an amalgam back to Indianapolis.

The Circuit Court of Appeals seems to think he did, for they say that the decree had its force not from anything done or agreed upon at Cleveland or elsewhere in the sixth circuit, but by virtue of the power and jurisdiction of the court that pronounced it (meaning the seventh circuit court). In view of the fact that that court had neither power nor jurisdiction in the premises at all, perhaps the presumption in that declaration is the best answer to it. But to the contrary, the Cincinnati judge and court expressly kept jurisdiction of the claim as passed upon to themselves, so that "whatever error there may have been in the decision, the validity of the decree is" (not) "beyond attack." It was vacated for invalidity.

II.

The Decree of January 28, 1893, was Appealable.

November 8, 1889, the petitioners presented their petition for rehearing in question to the Circuit Court for the District of Indiana in causes No. 7,706 and No. 7,814; and there-

upon the respondents beginning to argue the question whether a rehearing should be granted were stopped by the late Judge Gresham with the remark, in substance, that in view of the action of Mr. Justice Matthews and Judge Jackson in the sixth circuit he could not refuse to grant a rehearing. (Record, p. 35.) And an order was entered accordingly granting the rehearing. (Record, p. 178.) In this order, after a recital of the appearance of the parties by counsel, argument and submission to the court, "it is ordered by the court that said petition be and the same is hereby allowed, and by agreement of counsel in open court it is further ordered that said petition be and the same is hereby set down for further hearing before this court on the 13th day of January, A.D. 1890, at 10 o'clock A.M." The case was further heard, referred to a master, and the master reported thereon in favor of the petitioners. The respondents then raised the objection that the petition had been filed too late under Equity Rule 88. To meet this objection the petitioners asked leave and were allowed to amend their petition. The respondents, nevertheless, demurred to the petition as not brought in time under Rule 88; and the court sustained the demurrer and consequently dismissed the petition, allowing the petitioners an exception to the order sustaining the demurrer as well as to that dismissing the petition, and an appeal to the Circuit Court of Appeals.

In view of the statement of Judge Gresham that, because of the action of Mr. Justice Matthews and Judge Jackson in the sixth circuit, he could not refuse to grant a rehearing, in view of his order then entered granting a rehearing and setting the causes down for hearing on the petition, in view of the master's report in our favor and in view of the fact that the judge finally decided the causes, not as a matter of discretion, but for the assumed want of jurisdiction and as a matter of law on demurrer to the petition and allowed an appeal therefrom, how can it successfully be claimed that the

action of the court in sustaining the demurrer and dismissing the petition was in the exercise of a mere discretion from which no appeal lies? So far as it was a matter of discretion, he exercised that discretion in favor of a rehearing, and said that, in view of the action of Mr. Justice Matthews and Judge Jackson in the sixth circuit, he could not do otherwise.

An order allowing or disallowing a motion or petition for rehearing is ordinarily not reviewable, because the allowance or disallowance of the motion or petition is a matter resting in the sound discretion of the court to whom it is addressed. Thus the allowance of the petition by the order of November 8, 1889, was not reviewable if the court had jurisdiction and power to make it, as we contend it did. So also the granting of a writ of certiorari is a matter resting in the discretion of the court. But when the petition has been allowed, or the writ of certiorari has been granted and the record certified in obedience to it, the questions arising upon the petition or upon the record must be determined according to fixed rules of law, and their determination is reviewable on error. Especially is this true where the court decides the questions presented as a matter of strict law and right and not as a matter of discretion.

Besides, to the ordinary rule that the results of a motion for new trial or petition for rehearing are not reviewable, there is a well recognized exception within which the facts of this case bring it. In these causes the demurrer raised questions that might be decisive of the whole matter, and that were not determinable in the exercise of a mere discretion. The court sustained the demurrer, and in passing upon the petition did not exercise any discretion in respect of the matters stated therein. *Due exception was taken and is preserved in the record to the order of the court sustaining the demurrer. And the error of the court in sustaining the demurrer is reversible error.*

The decision of the Circuit Court of Appeals in this case

to the contrary is directly in conflict with numerous decisions of this court.

Am. Constr. Co. v. *J. T. & K. W. R. Co.*, 148 U.S. 387.
Harris v. *Barber*, 129 U.S. 366, 369.
Mattox v. *United States*, 146 U.S. 140, 147.
Logan v. *United States*, 144 U.S. 263, 282-3.
United States v. *Thomas*, 151 U.S. 577, 581.
See also *Pittsfield Natl. Bank* v. *Bayne*, 140 N.Y. 321, 328.
People v. *Brooklyn Fire Commiss.*, 103 N.Y. 370 and cases.
Steamboat New England, 3 Sumn. 506, 18 Fed. Cas. pp. 53, 56-7.
United States v. *Wilson*, 7 Pet. 160.
United States v. *Chicago*, 7 How. 190.
United States v. *Reid*, 12 How. 361.

So the decision of the Court of Appeals that "the appeal, if one is taken, must be always from the original decree, and not from the rulings on the petition for rehearing — if a rehearing has been asked," — is as applied to this case directly in conflict with the decision of this court in —

Moelle v. *Sherwood*, 148 U.S. 21, 26,

wherein as in the case at bar a rehearing had been granted, and the case set down and heard on the propositions presented by the petition for rehearing, and from the ruling and decree on those propositions an appeal was taken to this court and sustained.

See also *United States* v. *Thomas*, 151 U.S. 577, 581.
Mattox v. *United States*, 146 U.S. 140, 147.
United States v. *Wilson*, 7 Pet. 160.
Steamboat New England, 3 Sumn. 506, 18 Fed. Cas. 53, 56-7.

The case of *Steamboat New England*, *ubi supra*, is very similar to that at bar and directly in point. After the expiration of the term at which a decree was rendered, a petition in the nature of a libel for rehearing, or of a libel of review, was filed, and upon the hearing and argument by counsel, the district judge, being of the opinion that the decree rendered at the previous term was a final decree, and so had passed beyond the power and control of the court, dismissed the petition upon the ground that the court had no jurisdiction. From this decree of dismissal an appeal was taken to the Circuit Court.

Story, J., while admitting that in matters of discretion the judgment of the district judge would not be subject to the revising authority of the Circuit Court in the exercise of appellate jurisdiction, nevertheless said:

"The difficulty is, that the district judge, instead of hear- the petition upon its merits, dismissed it for want of jurisdiction, and if he possessed jurisdiction *then it might become the proper duty of this court to reverse that decree of dismissal*, and to remand the cause to the District Court for further proceedings, since, if the district judge had jurisdiction, it is by no means certain, taking all the circumstances together, that he might not, in the exercise of his discretion, have varied the original decree, and then the respondents might have brought up the whole proceedings before this court by appeal. The question, therefore, whether the district judge does possess any jurisdiction by a bill of review, or otherwise, after the term has passed, is directly presented for the consideration of this court."

And the court thereupon held that the original decree was not a final or definitive decree; that the district judge, therefore, had a clear remaining jurisdiction in the premises, and that the decree of the district judge on the petition ought to be reversed, and the case remanded to the district court for further proceedings. (18 Fed. Cas. pp. 53, 56-7.)

So in the causes at bar the Circuit Court sustained the

demurrer and dismissed the petition for assumed want of jurisdiction and power of the court to entertain a rehearing after the expiration of the term. If, therefore, the original decree was neither final nor valid, as we contend, then the Circuit Court had a clear remaining jurisdiction in the premises, and the decree sustaining the demurrer and dismissing the petition ought to be reversed, and the cause remanded for further proceedings.

Obviously between the right to appeal and the power or duty of the appellate court to re-examine, there is a clear distinction. And from the mere fact that the appellate court cannot or will not re-examine, it does not follow that there is no appeal. (*Great Western Tel. Co.* v. *Burnham*, 162 U.S. 339, 343.) The court can not re-examine a decree in the absence of error in the record, but it is appealable just the same, and the court will not dismiss the appeal for want of jurisdiction, but will affirm the decree for want of error. So the court will not and cannot re-examine a matter, the decision of which rested in the judicial discretion of the court, in the absence of gross abuse of said discretion; but it will not do to say that for that reason there is no appeal, for then the court could not re-examine even in the case of gross abuse. So a matter ordinarily determinable in the exercise of a mere discretion, may nevertheless have been determined in such a way as to involve the decision of matters not determinable in the exercise of a mere discretion, and to which error may be assigned, but if not appealable, such error could never be reviewed and corrected. *In the case at bar error was clearly assignable to the ruling of the court in sustaining the demurrer, and is reviewable on appeal.*

The whole matter is thus clearly and briefly summed up by John D. Works, formerly one of the justices of the Supreme Court of California, in his Treatise on Courts and Their Jurisdiction:

"It is frequently said that such a motion (motion for a new trial) is addressed to the discretion of the court; but it does not follow, by any means, that where a judgment is the result, or may have resulted, from some error of the court, its action is not subject to review. The contrary is uniformly held. But the exception, under the practice in most of the States and in the federal courts, must be to the ruling claimed to be erroneous and not to the action of the court in ruling upon the motion. In some States the exception goes directly to the ruling on the motion. But in either case it is a question of practice rather than of jurisdiction, except that an exception to the ruling on the motion, instead of the error complained of, may prevent an appellate court from passing upon the question."

Works, Courts and Their Juris., p. 691-2.

III.

Conflict between Sixth and Seventh Circuits.

The decision of the Circuit Court of Appeals on the questions as to the finality and the validity of the Cleveland decree, as on the merits generally, is not only in conflict with the decisions of this Court, as we shall show under divisions IV. and V. of this brief, but is also in conflict with the decision in the same matter of the Circuit Court of the United States for the sixth circuit, on whose proceedings, orders and decrees the petitioners mainly rely for the foundation and existence of the claims which they seek to enforce in these causes; and especially is in conflict with the decisions, opinions and views of the Circuit Court for the sixth circuit by the late Mr. Justice Jackson, then circuit judge, and the late Mr. Justice Matthews, then an associate justice of the Supreme Court, the Circuit Court for the sixth circuit having declared the Cleveland decree, so called, so far as the same related to the claim of the Iron Railroad and wherever entered, a mere nullity, and asserted substantially exclusive jurisdiction of the claim as a whole, and re-established the

claim as a whole as fully in all respects as if the Cleveland decree had never been passed. It was only on the question of distribution and enforcement that Mr. Justice Matthews and Judge Jackson required the concurrence of the Circuit Courts for the District of Indiana and the District of Illinois.

Two or three facts must constantly be borne in mind. In speaking of the Cleveland decree, so called, we have constantly to use the qualifying phrase: "So far as the same related to the claim of the Iron Railroad." The fact is that the Cleveland decree, while designated and spoken of as a single decree, embraces a dozen or more different decrees upon as many different matters between as many different parties, which decrees are distinguished from each other simply by the numbers of the paragraph or article in which they are contained; and some of these at least, as witness the sixth article or paragraph, were confessedly matters of local concern and jurisdiction in some one of the several circuits or districts. The decree disallowing the claim of the Iron Railroad is the eighth paragraph and reads as follows:

"It is further ordered, adjudged and decreed that the claim of the Iron Railroad for $41,748.39, reported and allowed by Gov. Cox, Special Master, be, and the same is, hereby rejected and disallowed. The exceptions now allowed to be filed to the master's report allowing said claim, are hereby sustained, and it is finally ordered, adjudged and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale take nothing by said claim and proceedings thereunder. To which ruling in disallowing and rejecting said claim, the purchasers of the Iron Railroad and the bondholders holding bonds secured by the first mortgage upon said Iron Railroad, here now except by leave of court granted, and they here now pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division."

It was the claim of the Iron Railroad that the decree purported to disallow, the claim of the Iron Railroad for $41,748.39, and the Iron Railroad and its claim for $41,748.39 were alone subject to the jurisdiction of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

Notwithstanding the Circuit Court for the Southern District of Ohio, Western Division, had established the claim of the Iron Railroad for the $41,748.39 by a decree overruling all exceptions to the report, which decree had been entered and the term ended before the meeting of the judges at Cleveland, the judges at Cleveland nevertheless purported to pass upon and *disallow* that same claim. As the allowance or disallowance of the claim was a matter within the jurisdiction of the Circuit Court for the Southern District of Ohio, Western Division, they purported to allow the bondholders and purchasers of the Iron Railroad an appeal to the Supreme Court "upon their giving bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division." The appeal, in other words, was allowed as an appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division, showing also that it was to be treated as a decree of that court and of no other. That is all of the decree against the claim of the Iron Railroad.

But the twelfth paragraph or article of the omnibus decree contains this: "All matters in *any* of these causes not finally disposed of by this or former decrees are hereby reserved for further determination." And the fourteenth paragraph or article contained this: "It is ordered that this decree be entered in all the causes pending in the sixth and seventh circuits." (Record, pp. 197, 198.) What becomes of the appeal in the Southern District of Ohio, Western Division, allowed in the Cleveland decree? If that appeal is perfected

and the decree reversed (as the decree is sure to be, being a nullity in the Circuit Court for the Southern District of Ohio, Western Division), what becomes of the entries in the other causes pending in the sixth and seventh circuits? Does the denial of the claim of the Iron Railroad in the only court that ever had jurisdiction of the Iron Railroad and of its claim, become a valid and binding decree when entered in courts that never had any jurisdiction of either? Does such an entry debar such other courts from passing on the only matters over which respectively they had jurisdiction, and which by the omnibus decree are expressly "reserved for further determination"? We submit not. And Mr. Justice Matthews and Judge Jackson in effect so held.

We did give the appeal bond in the sum of one thousand dollars to the approval of the Circuit Court of the United States for the Southern District of Ohio, Western Division, just as the decree provided. But, on an examination of the record of that court, it was so clear that the decree was not only erroneous but a mere nullity, that instead of perfecting the appeal in the Supreme Court, the petitioners filed a petition for rehearing in the very court from which the appeal was allowed and asked for a rehearing instead of the appeal, but only on condition that a rehearing might be had before the court as constituted before, or with a representative of the court to which the appeal had been taken. In fact, the petition for rehearing was filed and called to the attention of the court before the appeal bond was given.

Even at the hearing in Cleveland, counsel for petitioners suggested that he was *at great disadvantage from the absence* of the records of the Circuit Court of the United States for the Southern District of Ohio, Western Division, and *would like a reargument where that record would be available* before the decree against the claim should be regarded as final. And he construed the silence of the court as an indication

that the suggestion might not be regarded as unreasonable. (Record, p. 168.)

On the appeal to the Supreme Court from the Circuit Court for the Southern District of Ohio, allowed in the Cleveland decree itself, the decree would necessarily have to stand or fall on that record of the Circuit Court for the Southern District of Ohio.

He accordingly wrote Judge Gresham, requesting him to be present, and enclosing a copy of the letter theretofore sent to Judge Jackson. (Record, p. 169).

Judge Gresham, on the 2d of June, 1887, wrote in reply: "It will be impossible for me to be in Cincinnati on the 6th inst., as I am now sitting with Judge Harlan in hearing equity cases. . . . You are at liberty to show them this letter, if you like, that they may understand *why* I do not appear as requested."

And instead of asking or suggesting delay until he could attend, or that, in view of his inability to be present, the matter should be heard on appeal rather than on petition for rehearing, he added:

"If Mr. Justice Matthews and Judge Jackson grant a rehearing on your application, and enter such a decree as you desire, I presume I will conform to their action in this circuit." (Record, p. 169-70.)

The respondents were present and heard in argument, thus recognizing the fact that the Circuit Court of the United States for the Southern District of Ohio, Western Division, had substantially exclusive jurisdiction of the claim as disallowed in the Cleveland decree; and that the petition for rehearing of so much of the Cleveland decree as purported to disallow the claim of the Iron Railroad was properly presented and heard in that court, from which court also the decree itself had purported to allow an appeal and from no other.

Mr. Justice Matthews considered that the claim passed

upon in the Cleveland decree was one between the Iron Railroad and its receiver; and he treated the Cleveland decree, in so far as it related to and disallowed that claim, as one reversible in the Iron Railroad case and court, and not only on the ground that it was erroneous, but also on the ground that the matter had been previously adjudicated. In a letter to Judge Jackson he said:

"On consideration I submit to you the following suggestions upon the question as to the allowance to be made to the Iron R. R. Co. on account of the net earnings arising from the operation of its road having been applied by the receiver under the orders of the court to the expense of operating other parts of the consolidated line:

"I assume that the theory upon which the administration was had in the circuit was that of separate receiverships for each division, and that it is too late now to question its correctness in point of law.

"The receiver of the Iron Railroad is bound to account in that case for all its earnings, including the amount in question. He shows that under the order of the court he permitted it to be used by the receivers of the other divisions of the road; the court is therefore bound to see that these receivers in proper proportions refund it. It would seem, therefore, that such decrees should be entered in all the cases in this circuit, and that the Cleveland decree therefore *so far as it conflicted* with this result should be set aside either on the ground that the matter had been previously adjudged or that it was erroneous in those cases in which Judge Sage's decree was not conclusive.

"As to those cases in Indiana and Illinois it must be left to Judge Gresham to decide upon what rule he will act.

"If he declines to make the allowance against the divisions within those States, the divisions in this circuit should only be charged with their proportions of the whole."

Judge Jackson, in his letter to the clerk announcing the decision of the court, says, in so many words, that the application was "for a rehearing of the decree made at Cleveland in April, 1887, in the case of '*The Central Trust Com-*

pany of New York v. *The Iron Railroad Company et als.*' and '*The Central Trust Co.* v. *The T., C. & St. L. R. R. Co.*' and its constituents in Ohio, Indiana and Illinois, disallowing the claim of the Iron Railroad for the sum of $41,748.39." And his decision was that "an order may accordingly be entered *setting aside, vacating and annulling the decree made at Cleveland in the above cases so far as the same disallows said claim for $41,748.39*, which will stand for rehearing, and such further order and decree as may hereafter be made in respect of the same."

By the decree of August 1, 1887, rehearing was granted, and by the decree of November 12, 1888, the claim was reestablished as fully in all respects as if the Cleveland decree had never been passed. And, in both, the Cleveland decree disallowing the claim of the Iron Railroad for $41,748.39 was pronounced null and void.

Claim Never Submitted to Jurisdiction of Seventh Circuit.

The Court of Appeals says: "The decree had its force not from anything done or agreed upon at Cleveland or elsewhere in the sixth circuit, but by virtue of the power and jurisdiction of the court which pronounced it." (62 F.R. 170.) But the court for the seventh circuit never had power or jurisdiction to pronounce such a decree. It neither had jurisdiction of the claim as disallowed nor of the parties.

It was "the claim of the Iron Railroad for $41,748.39" that was disallowed and rejected. It was, as it purported to be, primarily a decree against the Iron Railroad itself, and only against the appellants as the purchasers of the Iron Railroad at foreclosure sale. The Iron Railroad was never a party to any of the proceedings in the seventh circuit. The seventh circuit never had and never undertook to exercise jurisdiction over it.

The petition and claim which the petitioners filed in Indi-

ana February 8, 1886, against the Toledo and St. Louis Divisions, set forth the claim as a whole only by way of introduction or inducement. The establishment of the claim as a whole was not a thing prayed for in the petition or submitted to the court; and the court was not authorized to pass on it, except incidentally in passing on and disposing of the petition and special claim thereby presented. At most it was but a thing to be proved in support of the special claim presented, and any decision of the court on it would be but as a finding of fact for or against the special claim.

The claim of the Iron Railroad passed on and disallowed in the Cleveland decree was a matter within the cognizance and substantially exclusive jurisdiction of the Circuit Court of the United States for the Southern District of Ohio, Western Division; it was a claim of the Iron Railroad, or the bondholders and purchasers thereof, against the receiver. In the order appointing him receiver of that division, the receiver was ordered to keep separate account, to file a separate inventory; and he gave a bond in that court to answer and account in that court and case for anything that should come into his hands as such receiver belonging to the Iron Railroad. And the Toledo, Cincinnati & St. Louis Railroad Co. was ordered to deliver to him any property in the State belonging to that division.

We submit, therefore, that so much of the Cleveland decree as purported to disallow the claim of the Iron Railroad for the $41,748.39 had been annulled, set aside and held for naught by the only court having jurisdiction of the same, precisely the same as if the appeal from that same court to this court, allowed in the Cleveland decree itself, had been perfected, and this court, on that appeal, had annulled it, set it aside and held it for naught, and is, therefore, as entered in other courts and causes, consequently without force and effect.

And that consequently the decision of the Court of Appeals

as to the finality and the validity of said Cleveland decree against the claim of the Iron Railroad, as entered in the District of Indiana, in causes No. 7,706 and No. 7,814, is not only in conflict with the decisions of this Court, as we shall show under divisions IV. and V. of this brief, but is also directly in conflict with the decisions, views and opinions of the Circuit Court for the sixth circuit by Mr. Justice Matthews and Judge Jackson, and is erroneous.

This disposes of the alleged decree on the substantial merits. Technically considered the decree stands no better and is no bar to a petition to rehear or vacate. For —

IV.

The Alleged Decree of April 16, 1887, not Final.

The decision of the Circuit Court of Appeals on the question of the finality of the Cleveland decree, so called, so far as the same related to the claim of the Iron Railroad, as entered April 16, 1887, in the Circuit Court for the District of Indiana in causes No. 7,706 and No. 7,814, is directly in conflict with the decisions of this Court in —

Craighead v. *Wilson*, 18 How. 199, 201;

McGourkey v. *Toledo, etc., Ry.*, 146 U.S. 544, 546, 548-51;

Lutta v. *Kilbourn*, 150 U.S. 524, 539;

Keystone Manganese Co. v. *Martin*, 132 U.S. 91, 93 and cases;

Nat'l Bank v. *Smith*, 150 U.S. 330, 334;

Winters v. *Ethell*, 132 U.S. 207, 209-10;

Lodge v. *Twell*, 135 U.S. 232, 235, 236;

Meagher v. *Minn. Thresher Mfg. Co.*, 145 U.S. 608;

Luxton v. *Bridge Co.*, 145 U.S. 337, 341;

Union Mut. L. Ins. Co. v. *Kirchoff*, 160 U.S. 370, 378;

Gt. Western Tel. Co. v. *Burnham*, 162 U.S. 339, 342-3, 346;

the doctrine of said cases being, as we understand them, that a decree is not technically a final decree, no matter how decisive in substance it may be of the rights of the parties, until the court has in fact and finally passed upon and granted or denied the relief prayed for in the complaint or petition; because the court in passing upon the subject matter as prayed for may change its rulings as to the substantial rights of the parties. Thus a decree establishing the rights of the parties and referring the cause to a master merely for an account is generally regarded as a final decree; but if the bill was brought for an accounting and specifically prayed for it, then such a decree is not final. In other words, "the decree must be final in all matters within the pleadings."

See also *Elder* v. *McCluskey*, (C. C. A. 6th) 70 F.R. 531, 555.

Morgan v. *Hagerman*, (C. C. A. 9th) 64 F.R. 499, 502.

In these causes the decree was clearly not final in all matters within the pleadings. Indeed it does not mention the only claim presented. February 8, 1886, the petitioners filed in the Circuit Court for the District of Indiana in these causes, No. 7,706 and No. 7,814, their "Petition and Claim No. 69*a*" which, setting out the claim as a whole merely by way of introduction or inducement, showed that there was due from the Toledo Division in cause No. 7,706, $12,364.73, and from the St. Louis Division in cause No. 7,814, $12,278.46. These pleadings were the only pleadings in either cause as between the petitioners and the respondents. And it is averred in the petition for rehearing, and admitted by the respondents' demurrer thereto, that the "Petition and Claim No. 69*a*" was never passed on by the Court. This averment was not overlooked by the Court of Appeals in its statement of the facts (62 F.R. 168); but the Court of Ap-

peals nevertheless erroneously held that the entry in these causes on April 16, 1887, was a final decree. Even if valid and however decisive it may have been in substance of the rights of the parties, it was not, within the rules laid down by this Court in the cases *supra*, technically a final decree as between the petitioners and the Toledo Division in cause No. 7,706, or as between the petitioners and the St. Louis Division in cause No. 7,814.

There was no contention that these two divisions were in any manner liable or should be held for the $41,748.39. The claim against each division was substantially a claim for money had and received, and only for the amount received.

The claim against the Toledo Division in cause No. 7,706 was not $41,748.39, but $12,360.73; and the claim against the St. Louis Division in cause No. 7,814 was not $41,748.39, but $12,278.46. The denial of the claim as a whole for the $41,748.39 might have been a good reason for the denial of the claim against the Toledo Division for the $12,360.73, set up in the petition, just as sustaining a demurrer to a bill may be a good reason for dismissing the bill itself; but it is not necessarily the same thing, so far as the right of appeal is concerned. And when an alleged decree did not, in fact, and was never designed to be, a denial of a particular claim as set up in a particular petition, there is neither sense nor justice in construing it to have had that result.

V.

The Alleged Decree of April 16, 1887, a Mere Nullity.

The decision of the Court of Appeals on the question of the validity of the Cleveland decree, so called, so far as the same related to the claim of the Iron Railroad, as entered April 16, 1887, in the Circuit Court for the District of

Indiana in causes No. 7,706 and No. 7,814, is directly in conflict with the decision of this Court in—

Reynolds v. *Stockton*, 140 U.S. 254,

which holds that a decree outside of and unsupported by the pleadings in the case is absolutely null and void. In that case, as in these causes, the claim as a whole was in fact presented to the court whose judgment was called in question, but only for a special purpose and not to ask judgment on it, and no judgment on it was asked for or prayed; and it was held that the judgment was therefore unauthorized, null and void.

Under division IV. of this brief, we show that we had filed in these causes, to wit, causes No. 7,706 and No. 7,814 in the Circuit Court for the District of Indiana, our "Petition and Claim No. 69*a*" for $12,360.73 against the Toledo Division in cause No. 7,706, and for $12,278.46 against the St. Louis Division in cause No. 7,814; and that this petition and claim No. 69*a* was never passed on by the court, so that the alleged decree was at best not a final decree, under the decisions of this Court.

The decree purports to disallow the claim of the Iron Railroad for the $41,748.39 and to stand on exceptions which the decree itself purports to allow to be filed to Cox's third and final report that reported and allowed the claim of the Iron Railroad for the $41,748.39.

But in one of these causes, to wit, No. 7,814, in the Circuit Court for the District of Indiana, the decree is utterly without any such foundation; for the order of reference to Special Master Cox, in pursuance of which that report was made, was never entered in cause No. 7,814, and his final report which reported and allowed the claim for the $41,748.39 was never filed or adopted in that cause; and although the decree purports to allow exceptions to be filed to the report and to sustain them, as a matter of fact no such exceptions

were filed to be sustained. There can be no question, therefore, but that, in this cause at least and as between the petitioners and the St. Louis Division or the bondholders and purchasers thereof, the alleged decree, even if intended as a decree in that cause, was utterly without foundation and a mere nullity on its face, not only outside of and unsupported by the actual pleadings in the cause, but expressly purporting to stand on proceedings that were never had and that were never any part of the case.

And yet the Court of Appeals says that the Cleveland decree, so called, as entered on the 16th of April, 1887, in the Court for the District of Indiana "was not invalid" and "was effective to dispose of the claim of the appellants, whether considered as having been brought under the jurisdiction of the court by the reports of the special masters or by the bondholders' petition of February 8, 1886." (62 F.R. 170.) Just think of it! The bondholders' petition of February 8, 1886, presented the claim as a whole only by way of inducement, and that petition was never passed on by the court; and the report of the special master that found and reported the claim for the $41,748.39 was never filed or adopted or entitled to be filed in the cause; and yet the Court of Appeals says that the Circuit Court in that cause nevertheless had jurisdiction and its decree was effective, whether founded on the petition which was never passed on or the report that was never a part of the cause. A mere statement of it shows its absurdity. The alleged decree was not in fact and could not have been founded upon either. That much of the decision of the Court of Appeals, involving the rights of the petitioners to their claim for $12,278.46 in cause No. 7,814, is manifestly erroneous, and, as we have already stated, is directly in conflict with the decision of this Court in *Reynolds* v. *Stockton*, *ubi supra*.

In cause No. 7,706, and as between the petitioners and the Toledo Division, the alleged decree does have this pretence

to foundation and validity: The order of reference to Special Master Cox was entered in this cause and his report filed there. But even in that cause the alleged decree is without foundation and validity; for although the decree purports to allow exceptions to be filed to Cox's report and to sustain the same, as a matter of fact no such exceptions were so filed to be sustained. (See also Equity Rule 83; *Farrar* v. *Bernheim*, (C. C. A. 5th) 75 F.R. 136; *Gasquet* v. *Crescent City Brew'g Co.*, 49 F.R. 494, 495.) After the expiration of the term, to wit, June 28, 1887, the court for the district of Indiana purported to allow them to file such exceptions *nunc pro tunc*, but this, if of any consequence, was without petition therefor and without notice to these petitioners, and after the argument at Cincinnati of the petition for rehearing for the vacation of the Cleveland decree and the enforcement of the claim, and after the promise of Judge Gresham to conform to the action of Mr. Justice Matthews and Judge Jackson thereon. (Record, p. 169-70.)

We further show, *supra*, that the claim passed on in the Cleveland decree, so called, was never submitted to the jurisdiction of the Circuit Court for the seventh circuit, but was substantially within the exclusive jurisdiction of the Circuit Court for the sixth circuit, and was *res adjudicata* there before the making or entry of the alleged Cleveland decree.

See *supra*, pp. 20-22, 14, 16, 18-19.

That the special master in his report to the Circuit Court for the seventh circuit included the claim as a whole, did not authorize that court to make any decree upon the claim as a whole as a separate and independent matter and apart from any issues presented by the pleadings in the causes. To prevent any mistake on this point the order of reference itself expressly directed and provided "That the parties respectively have leave to amend their pleadings as they may be advised, *in order to properly present for determination* any

and all questions that may properly arise upon the master's report." (Record, p. 63.) Any decree, to be a final and valid decree in the cause, must necessarily be one founded upon and confined to the matters in issue between the parties as presented by the pleadings.

It is well settled that a foreign or domestic decree, having adjudicated a matter not presented by the pleadings nor within the issue, is not merely voidable, but must be treated as a nullity. Such a decree, if foreign, is not entitled to faith and credit, though properly authenticated according to the Act of Congress.

Munday v. *Vail*, 34 N.J. L. 418.
Reynolds v. *Stockton*, 43 N.J. Eq. 211.
Reynolds v. *Stockton*, 140 U.S. 254.
Burton v. *Platter*, (C.C.A. 8th) 53 F.R. 901.
Lamaster v. *Keeler*, 123 U.S. 376, 391.
Jones v. *Davenport*, 45 N.J. Eq. 77, 81.
Aspinwall v. *Aspinwall*, (N.J.) 24 Atl. 926, 927.
Consol., etc., Co. v. *The Atl. Tr. Co.*, (N.J.) 24 Atl. 229, 231, 233.
Van Fleet, Collat. Attack, pp. 805, 806, 808 and cases.

And such a judgment, being null and void and not merely voidable, may be vacated on motion or petition at any time and notwithstanding the lapse of the term at which it was entered. The court having been advised that what purports to be its judgment is a nullity, will remove the ineffectual entry from the record of its proceedings.

Thomas v. *Am., etc., Mort. Co.*, 37 F.R. 550, 558.
Heckling v. *Allen*, 15 F.R. 196 and cases.
United States v. *Wallace*, 46 F.R. 569, 570.
United States, v. *Gayle*, 50 F.R. 169, 170.
Little Rock Junc. Ry. v. *Burke*, (C.C.A.8th) 66 F.R. 83, 88, 89.

Consol., etc., Co. v. *Atl. Tr. Co.*, (N.J.) 24 Atl. 229, 231, 233.
Jones v. *Davenport*, 45 N.J. Eq. 77, 81.
Black on Judg., ss. 297, 307, 326, 328.
Van Fleet, Collat. Attack, p. 8, s. 6 and cases.

The petitioners could not successfully move a vacation of the entry until they had obtained a vacation of the original in the Circuit Court of the United States for the Southern District of Ohio, Western Division.

Heckling v. *Allen*, *ubi supra*.

And a motion or petition in the cause are the common and most appropriate modes of procedure for the annullment of such a judgment or decree.

Centr. Tr. Co. v. *Grant Loco. Works*, 135 U.S. 34 L. ed. 100, 103-4.
Heckling v. *Allen*, 15 F.R. 196.
United States v. *Wallace*, 46 F.R. 569, 570.
United States v. *Gayle*, 50 F.R. 169, 170.
Edson v. *Edson*, 108 Mass. 590, 596-7.
Robb v. *Vos*, 155 U.S. 13.
See also Equity Rule 85.

And the petition in these causes prayed expressly that so much of the Cleveland decree as purports to disallow said Iron Railroad claim may be vacated, annulled and held for naught, etc. (Record, p. 44.)

We also show, under division III. of this brief, that the decree was null and void and beyond the power and jurisdiction of the court to pass, on the very ground on which it is now claimed to be beyond the power and jurisdiction of the court to vacate, namely, because the claim as a whole had been established by the decree of February 19, 1887, and the decree entered and the term ended before the making of the Cleveland decree. The court could not at the

next term disallow a claim which had been finally established and passed beyond the control and jurisdiction of the court by the expiration of the term. And that is just what the judges at Cleveland purported to do, disallowing the claim as the claim of the Iron Railroad, and treating that decree as the decree of the Circuit Court for the Southern District of Ohio, Western Division, in the Iron Railroad case, and allowing an appeal to the Supreme Court as from the said Circuit Court of the United States for the Southern District of Ohio, Western Division, alone, the very court which originally had jurisdiction of the Iron Railroad and of its claim, and in which the claim had been established and passed beyond the power and control of the court. If null and void in the court having jurisdiction of the claim as passed on, it was not validated by entry in other courts that never had jurisdiction of the claim as passed on.

Respectfully submitted,

JOHN C. COOMBS,
CHAS. H. HANSON,
Solicitors for Petitioners.